Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(1) DEFINITIONS/1. Meaning of 'real property' and 'chattels real'.

REAL PROPERTY (

Copyholds

This title incorporates material formerly contained in PARAS 751-752, 784-900 of the title COPYHOLDS.

1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND

(1) DEFINITIONS

1. Meaning of 'real property' and 'chattels real'.

The term 'property' is used to denote either rights in the nature of ownership or the corporeal things, whether lands or goods, which are the subjects of such rights[1]. 'Real' denotes that the thing itself, or a particular right in the thing, may be specifically recovered[2]; and, since originally specific recovery was only allowed in cases where the claimant was entitled to a freehold interest, that is, an estate for life or a greater estate[3], 'real property' denotes (1) land and things attached to land so as to become part of it; and (2) rights in the land which endure for a life or were, under the law before 1926, inheritable, whether these involve full ownership or only some partial enjoyment of the land or the profits[4]. On the other hand, rights in land which endured for a term of years only were not originally specifically recoverable and were described as 'chattels real'[5].

1 This dual meaning of 'property' arises from a tendency to identify the corporeal thing with the aggregate of rights which make up the entire right of ownership, including the right of exclusive possession or enjoyment; and it is confined to cases where the right involves possession. Thus, where a person is entitled to land in fee simple in possession, 'property' is appropriate to describe both the land itself and his interest in the land; but, where the right does not involve possession of a corporeal thing, where eg it is an easement or a rentcharge, 'property' denotes a right only: see Austin's Jurisprudence (5th Edn) 361, 777; Williams on the Law of Real Property (24th Edn) 4. This identification of the right of ownership with the land itself accounts, also, for the dual meaning of 'corporeal hereditament'. All rights in land which formerly were heritable, whether involving full ownership with possession or only a partial right, such as a rentcharge, unaccompanied by possession, are, strictly speaking, incorporeal hereditaments (see Challis's Law of Real Property (3rd Edn) 49); but the right of ownership with possession is identified with the land itself and is called a 'corporeal hereditament', and the term 'incorporeal hereditament' is reserved for partial rights in the land. See further PARAS 74, 80-82 post. As to the distinction between property and power see POWERS.

In the Law of Property Act 1925, unless the context otherwise requires, 'property' includes any thing in action and any interest in real or personal property: s 205(1)(xx). Here 'property' is used to mean an incorporeal right, and, also, in the case of land, the corporeal thing. In the case of personal property it may be either a corporeal thing, such as a vehicle, or an incorporeal thing, such as a share in a company. As to things in action see CHOSES IN ACTION vol 13 (2009) PARA 1 et seq.

In the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13), 'property' includes a thing in action, and any interest in real or personal property: s 1(4). In an instrument effecting or purporting to effect a disposition of property, certain covenants for title are implied by statute: see s 1(1)-(3); and SALE OF LAND.

2 This follows from the division of actions into real and personal, a division which is quite distinct from that between actions in rem and actions in personam. See also 4 LQR 394 et seq.

3 This incident of specific recovery has no actual connection with the nature of the right of property: see 2 Pollock and Maitland's History of English Law (2nd Edn) 181 et seq; and PERSONAL PROPERTY vol 35 (Reissue) PARA 1201. A more substantial distinction is that 'things real are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go': 2 Bl Com (14th Edn) 16. However, this only suits tangible forms of personal property, and not the most important modern forms such as shares and other choses in action. As to the specific recovery of interests in land which were of a freehold nature and based on 'seisin' see 3 Holdsworth's History of English Law (3rd Edn) 5 et seq; 7 Holdsworth's History of English Law 23 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn) 30.

4 As to the distinction between immovables and movables see *Re Earnshaw-Wall* [1894] 3 Ch 156; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 380 et seq.

5 As to the development of the action of ejectment, so as to give a lessee the right to specific recovery of the land, see 3 Holdsworth's History of English Law 213 et seq; and as to the adaptation of the action to the recovery of freeholds see 7 Holdsworth's History of English Law 10 et seq. See also PARA 260 post.

2. Meaning of 'estate' and 'real estate'.

'Estate' has two meanings. In its narrower meaning it denotes the fee simple of land and any of the various interests into which it could formerly be divided at law, whether for life, or for a term of years or otherwise[1]; and, where there was an estate at law, there could be a corresponding estate in equity[2]. In its wider meaning it denotes any property whatever and is divided into real and personal estate[3]. 'Real estate' is a technical term and is generally to be construed in its technical sense[4]. It comprises all freehold[5] (and formerly copyhold[6]) lands, tenements and hereditaments, but not leasehold interests[7], although for the purposes of devolution on death under the Administration of Estates Act 1925 it includes chattels real[8]. Before 1926, freehold estates were either estates of mere freehold, that is estates for life or lives, or estates of inheritance[9]. 'Real estate' includes, also, any rights in land, such as a rentcharge[10], which admit of being limited in the same manner as freehold estates or interests[11].

1 'State or estate signifieth such inheritance, freehold, term for years, tenancy by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements': Co Litt 345a. Statute merchant and statute staple were forms of security for money: 2 Bl Com (14th Edn) 160. Both are obsolete. Elegit was a method of execution which was abolished by the Administration of Justice Act 1956 s 34(1) (repealed). See also CIVIL PROCEDURE vol 12 (2009) PARA 1265 et seq.

2 Only legal estates are of freehold tenure (see PARAS 4, 47 post); but equitable interests corresponding to freehold estates at law, such as an equity of redemption, were the subject of equitable seisin, and were known as 'equitable estates': *Casborne v Scarfe* (1738) 1 Atk 603 at 606. They are now more commonly known as 'equitable interests': see the Law of Property Act 1925 ss 1(3), 205(1)(x) (as amended). For the meaning of 'legal estates' and 'equitable interests' see PARAS 45-46 post.

3 'The word 'estate' doth comprehend all that a man hath property or ownership in, and is divided into real and personal': *Anon* (1684) Skin 193; *Countess of Bridgewater v Duke of Bolton* (1704) 6 Mod Rep 106; *Barnes v Patch* (1803) 8 Ves 604. As to personal estate see PERSONAL PROPERTY vol 35 (Reissue) PARA 1204.

4 *Butler v Butler* (1884) 28 ChD 66 at 71.

5 *Countess of Bridgewater v Duke of Bolton* (1704) 6 Mod Rep 106.

6 *Car v Ellison* (1744) 3 Atk 73 at 75; *Reid v Shergold* (1805) 10 Ves 370 at 378; *Torre v Browne* (1855) 5 HL Cas 555 at 571; *Re Sirett, Pratt v Burton* [1968] 3 All ER 186, [1969] 1 WLR 60. However, the fact that copyholds could formerly not be devised at law without a surrender to the uses of the will led to the rule that 'real estate' in a will did not include copyholds in the absence of evidence of intention to include them: see *Car v Ellison* supra; and WILLS vol 50 (2005 Reissue) PARA 329. As to customary freeholds see PARA 11 note 7 post, and as to copyholds see PARA 31 et seq post; and CUSTOM AND USAGE.

7 *Holmes v Milward* (1878) 47 LJ Ch 522; *Butler v Butler* (1884) 28 ChD 66. But in a will a devise of real estate may, by reason of the context, pass leaseholds for years: see WILLS vol 50 (2005 Reissue) PARA 582. Leaseholds for lives were real estate (*Weigall v Brome* (1833) 6 Sim 99); but see now para 101 note 5 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240. Where a person has a legal term of years and an equitable freehold estate, or vice versa, the term becomes attendant upon the inheritance, and is treated as real estate: see 1 Sanders on Uses (5th Edn) 518; *Capel v Girdler* (1804) 9 Ves 509; *Re Sergie, Shribman v Hall* [1954] NI 1 at 34, NI CA, per Black LJ.

8 See the Administration of Estates Act 1925 s 3(1)(i). See also EXECUTORS AND ADMINISTRATORS.

9 See Littleton's Tenures s 57; Co Litt 266b, Butler's note (1); Challis's Law of Real Property (3rd Edn) 99.

10 As to rentcharges see PARA 45 post; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

11 As to other rights included in the term 'real estate' see PARA 52 et seq post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(1) DEFINITIONS/3. Chattels real.

3. Chattels real.

Personal estate is divided into chattels real and chattels personal[1]. Terms of years[2] are chattels real: chattels because they devolve at common law, with chattels in the proper sense, on the personal representatives[3]; real because they are derived out of real estate[4].

The chief differences between real estate and chattels real were with regard to legal remedies, the mode of devolution on death and the rights of succession on intestacy. These differences have now disappeared[5], and the distinction is mainly of historic interest.

1 *Countess of Bridgewater v Duke of Bolton* (1704) 6 Mod Rep 106 at 107. As to chattels personal see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1204-1205.

2 A tenancy by elegit (now abolished: see PARA 2 note 1 ante) was a chattel real: see *Johns v Pink* [1900] 1 Ch 296.

3 See *Davis v Gibbs* (1730) 3 P Wms 26 at 30; *Whitaker v Ambler* (1758) 1 Eden 151 at 152; and EXECUTORS AND ADMINISTRATORS.

4 *Countess of Bridgewater v Duke of Bolton* (1704) 6 Mod Rep 106; *Smith v Baker* (1737) 1 Atk 385 at 386; *Ridout v Pain* (1747) 3 Atk 486 at 492. Alternatively, terms of years are real because they concern the realty: Co Litt 118b. A rent issuing out of a term of years is a chattel real: *Re Fraser, Lowther v Fraser* [1904] 1 Ch 111 at 115; affd [1904] 1 Ch 726, CA.

5 As to actions to recover land see PARA 259 et seq post. As to the assimilation of the law relating to devolution on death and succession on intestacy see EXECUTORS AND ADMINISTRATORS. Before 1926 an estate tail could not exist in chattels real, but this distinction was abolished by the Law of Property Act 1925 s 130(1) (now repealed). Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new entailed interests, in either real or personal property: see s 2(6), Sch 1 para 5; and PARA 105 post.

(2) THE COMMON LAW

(i) The Feudal System

4. No absolute ownership of land.

Technically, land is not the subject of absolute ownership but of tenure. According to the doctrines of the common law there is no land in England in the hands of a subject which is not held of some lord by some service and for some estate[1]. This tenure is either under the Crown directly, or under some mesne lord, or a succession of mesne lords, who, or the first of whom, holds of the Crown. Thus the monarch is lord paramount, either mediate or immediate, of all land within the realm[2]. The tenure of land is based upon the assumption that it was originally granted as a 'feud'[3] by the monarch to his immediate tenant on condition of certain services, and, where there has been subinfeudation, that the immediate tenant in turn regranted it[4]. Although for most purposes this system, known as 'the feudal system', has lost its practical importance, it still determines the form of property in land[5].

1 Co Litt 65a, 93a; 2 Bl Com (14th Edn) 52; Challis's Law of Real Property (3rd Edn) 4. Land owned by a subject, and not held of a lord, is called allodial land (Co Litt 1b; 2 Bl Com (14th Edn) 47); and a system of allodial ownership appears to have preceded the feudal system in England, the land thus owned being termed, according to the mode of acquisition, 'bookland' or 'folkland': Co Litt 65a, Hargrave's note; 1 Pollock and Maitland's History of English Law (2nd Edn) 60 et seq; 2 Holdsworth's History of English Law 67 et seq. Such ownership is assumed to have been, at any rate as to bookland, or land received by grant, absolute ownership, and the term 'allodium' is used to denote land owned absolutely. The term survived the institution of the feudal system, and was applied to land held of a lord, so that a man was sometimes said to hold in allodio; but the allodium and the beneficium were then becoming transformed into the feodum: 1 Pollock and Maitland's History of English Law (2nd Edn) 72; 2 Holdsworth's History of English Law 71 et seq, 199 et seq. See also the text and note 3 infra.

2 Co Litt 1a, 65a; 2 Co Inst 501: 'Therefore the King is summus dominus supra omnes'. As to the position of the monarch as the liege lord of Her subjects see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 29 et seq; and T Cyprian Williams 'The Fundamental Principles of the Present Law of Ownership of Land' (1931) 75 Sol Jo 843.

3 'Feudeum', 'feodum', 'fief', 'fee': these appear to be all forms of the same word. As to their derivation see Digby's History of the Law of Real Property (5th Edn) 31n; cf 2 Bl Com (14th Edn) 45. The hypothesis is that the land was granted by a chieftain to his follower; in Latin as a 'beneficium'; in the Teutonic languages as a 'fief', or 'fee' -- Latinised into feudum, feodum -- or their equivalents. The English terms were 'feodum' and 'fee': 1 Pollock and Maitland's History of English Law (2nd Edn) 236 note (2). The grant assumed and perpetuated the relation of lord and vassal, and the interest of the donee came to be hereditary. The leading idea in 'feud', as used in the expression 'feudal system', is that of vassalage; in the form 'fee' the hereditary nature of the vassal's interest is most prominent: see 1 Pollock and Maitland's History of English Law (2nd Edn) 66 et seq. As to the theory that the title to all land is derived ultimately from the Crown see 2 Bl Com (14th Edn) 50-51. The term 'feu' is in everyday use in Scotland. Feu is there the prevailing tenure of land, and is now of the nature of a perpetual lease.

4 See 1 Pollock and Maitland's History of English Law (2nd Edn) 232, 237.

5 It was said before 1926 that the practical consequences of tenure in modern times were (1) escheat (see PARA 6 post); (2) the lord's rights in respect of copyholds (see CUSTOM AND USAGE); (3) the rights of lord and commoners (see COMMONS vol 13 (2009) PARA 408 et seq) in respect of waste lands of a manor: Challis's Law of Real Property (3rd Edn) 3. Escheat for want of heirs was abolished by the Administration of Estates Act 1925 s 45(1)(d), and the lord's rights in respect of former copyhold lands have been reduced to rights in respect of mines and minerals and market franchises and sporting rights, where these have not in particular cases been extinguished: see PARA 35 post. He may, however, still have rights in respect of his seigniory, including rights over commons, but, in general, tenure is now equivalent to property.

5. Forms of tenure; in general.

Tenure carried with it reciprocal obligations and rights on the part of lord and tenant[1]. The lord was bound to defend his tenant's title[2], and the tenant was bound to render to his lord certain services[3]. The nature of these services varied according to whether the tenure was in chivalry[4] or in socage. In addition, land might be granted to the church, and, if no services were reserved, this was tenure in frankalmoin[5].

The usual form of tenure in chivalry was tenure by knight service[6]. The personal relation of lord and tenant was constituted by homage and fealty[7], and the essential service was the providing of one or more knights according to the size of the fee[8]. This service came to be generally commuted for a money payment known as 'escuage' or rent[9]. The tenure imposed upon the tenant the burdens known as relief and aid, and gave the lord the rights, if the tenant had died leaving an infant heir, of the wardship and marriage of such heir[10].

Tenure in socage, supplemented by tenure in villeinage, provided for the practical requirements of agriculture. Every freehold tenure which was not in chivalry or in frankalmoin came to be classed as socage; and a freehold tenure, where only fealty was due, was of this nature[11]. Where the main feature of a grant of land on freehold tenure was the payment of a rent in money, the tenant was frequently said to hold in 'fee farm', and the rent was called a 'fee farm rent', but the tenure was a socage tenure[12]. Homage[13] was not required in socage tenure[14], but the tenant did fealty, and usually rendered services such as plough service or the payment of fixed escuage or money rent; and it was said to be essential to this tenure that any services should be certain[15]. There might be relief payable in money, such as one year's rent, or in kind[16], but the lord was not entitled to the rights of marriage or wardship[17]. Services in money or labour were not a necessary incident of socage tenure[18].

Where the land was held by personal service, the tenant was a 'serjeant'[19], and his tenure was known as 'tenure in serjeanty'[20]. This tenure was ordinarily a tenure in chivalry and carried with it relief, wardship and marriage, but the personal nature of the service forbade its commutation for escuage (or scutage). Ultimately a distinction was drawn between service of an honourable or important nature, which constituted the tenure of 'grand serjeanty'[21] and existed only under the Crown immediately, and the tenure known as 'petty serjeanty'[22], where the service was the rendering of some small matter incident to warfare, but petty serjeanty did not carry wardship or marriage, and was in effect a socage tenure[23].

The difference between free and unfree tenures corresponded in the main to differences in status between free men and villeins. Tenures in chivalry and free socage were the tenures of free men, and the tenant had a free holding[24]. Tenure in villeinage was the tenure of an unfree man, although a free man might hold it[25]. The value of a right depends on the protection which the law gives it, and the proprietary and possessory actions allowed in the King's courts were reserved for freeholders[26]. Originally the tenant in villeinage had only such protection as he could obtain in the manorial court, which, however, may have been effective enough as against everyone except the lord[27]. Ultimately the custom of the manor so confirmed him in his holding that the King's courts allowed an action of trespass against the lord[28]. The villein tenant had by this time become the copyholder[29], and his tenure came to be as well protected as freehold tenure[30].

1 1 Pollock and Maitland's History of English Law (2nd Edn) 236.

2 1 Pollock and Maitland's History of English Law (2nd Edn) 300, 306; 2 Bl Com (14th Edn) 46.

3 2 Bl Com (14th Edn) 53-54.

4 Tenure in chivalry furnished the basis of the military organisation of the Teutonic races after the fall of the Roman Empire: see 2 Bl Com (14th Edn) 62. As to the speedy decay of feudalism as a military system see 1 Pollock and Maitland's History of English Law (2nd Edn) 252. As to the modern relationship between the Crown and the armed forces see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 883 et seq.

5 Land held by ecclesiastics in right of their churches, where no definite service either spiritual or secular was due, was held in free alms or frankalmoin. As to this tenure see Littleton's Tenures s 133 et seq; 2 Bl Com (14th Edn) 100; 1 Pollock and Maitland's History of English Law (2nd Edn) 240 et seq; 3 Holdsworth's History of English Law 34-37; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 19. As to church property generally see ECCLESIASTICAL LAW.

6 See 1 Pollock and Maitland's History of English Law (2nd Edn) 252 et seq; 2 Bl Com (14th Edn) 62; 3 Holdsworth's History of English Law 37 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 16 et seq.

7 See 1 Pollock and Maitland's History of English Law (2nd Edn) 296 et seq; 3 Holdsworth's History of English Law 54-57. As to homage see Co Litt 64a, and as to fealty see Co Litt 67b. See also 2 Bl Com (14th Edn) 53-54.

8 2 Bl Com (14th Edn) 62. However, the knight's fee did not represent any fixed extent of land. As to this, and as to the apportionment of the number of knights as between the monarch and his tenants in chief see 1 Pollock and Maitland's History of English Law (2nd Edn) 256 et seq. As to the introduction and size of knight's fee see Round's Feudal England 225-235. An estate held of the Crown, consisting of many knight's fees held of the tenant in capite, came to be known as an honour or barony: 1 Pollock and Maitland's History of English Law (2nd Edn) 259. The distinction between peers and commoners may have arisen in this way.

9 This was so in the case of tenants not holding directly of the Crown, and homage, fealty and escuage (or scutage) were a sufficient test of tenure by knight's service: Littleton's Tenures s 103. See also 1 Pollock and Maitland's History of English Law (2nd Edn) 272, 274 note (1); 2 Bl Com (14th Edn) 74. Strictly the escuage was due to the immediate lord, and it is doubtful how far it was levied directly by the monarch: 1 Pollock and Maitland's History of English Law (2nd Edn) 253 (note (1)), 269; 3 Holdsworth's History of English Law 42-44.

10 Littleton's Tenures s 103; Co Litt 76a. As to relief, ie a sum to be paid by the tenant on succeeding to the fee, see Littleton's Tenures ss 112, 113; 1 Pollock and Maitland's History of English Law (2nd Edn) 307 et seq. The recognised 'aids' were to ransom the lord, to marry his eldest daughter and to knight his eldest son, and there might also be an aid to assist the lord in paying his own relief: see 1 Pollock and Maitland's History of English Law (2nd Edn) 349-351. As to wardship and marriage see Littleton's Tenures ss 109, 110, 114, 115; 1 Pollock and Maitland's History of English Law (2nd Edn) 318 et seq. In the case of tenants in chief there was an additional relief known as 'primer seisin': see 1 Pollock and Maitland's History of English Law (2nd Edn) 311. As to all these incidents of tenure in chivalry see also 2 Bl Com (14th Edn) 63 et seq.

11 Littleton's Tenures s 131. With socage tenure were sometimes associated special incidents so as to constitute particular species of this tenure: see PARA 11 post.

12 1 Pollock and Maitland's History of English Law (2nd Edn) 293.

13 Homage was peculiarly an incident of military tenure, although it was occasionally rendered by socage tenants: 1 Pollock and Maitland's History of English Law (2nd Edn) 305. As to its nature see Co Litt 64a-67b.

14 As to socage tenure see generally Cheshire and Burn's Law of Real Property (15th Edn, 1994) 19 et seq.

15 Littleton's Tenures ss 117-120. The burden of the services might, however, vary from year to year, as in the service of shearing all sheep on the grantor's land: Co Litt 86a. The extent of uncertainty permissible was left open in *A-G for Alberta v Huggard Assets Ltd* [1953] AC 420 at 443, [1953] 2 All ER 951 at 955, PC.

16 Littleton's Tenures ss 126-128. See also 1 Pollock and Maitland's History of English Law (2nd Edn) 308; *Anon* (1578) 3 Dyer 362b (18).

17 See 1 Pollock and Maitland's History of English Law (2nd Edn) 294; 2 Bl Com (14th Edn) 80. The wardship of an infant heir until 14 years went to his nearest relation to whom the inheritance could not descend: Littleton's Tenures s 123.

18 Fealty alone made socage tenure: Littleton's Tenures ss 118, 131. See also 2 Bl Com (14th Edn) 80. For instances of various services incident to tenure see *Bruerton's Case* (1594) 6 Co Rep 1a at 2a. As to the origins of socage tenure see Vinogradoff's Villeinage in England 178-210; 1 Pollock and Maitland's History of English

Law (2nd Edn) 291-296, 362; 2 Pollock and Maitland's History of English Law (2nd Edn) 270; 3 Holdsworth's History of English Law 51 et seq.

19 See 1 Pollock and Maitland's History of English Law (2nd Edn) 282 et seq; 3 Holdsworth's History of English Law 46.

20 As to tenure in sergeanty see generally Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 18.

21 As to grand serjeanty see Littleton's Tenures ss 153-158, 161; 2 Bl Com (14th Edn) 73; and CROWN PROPERTY.

22 As to petty serjeanty see Littleton's Tenures ss 159-161; 2 Bl Com (14th Edn) 81; and as to both grand and petty serjeanty see 1 Pollock and Maitland's History of English Law (2nd Edn) 282 et seq, 334, 355; 3 Holdsworth's History of English Law 46 et seq.

23 See Littleton's Tenures s 160; 1 Pollock and Maitland's History of English Law (2nd Edn) 325, 355.

24 Ie liberum tenementum. See also PARA 9 note 4 post.

25 1 Pollock and Maitland's History of English Law (2nd Edn) 359; Vinogradoff's Villeinage in England 80 et seq; 2 Bl Com (14th Edn) 90 et seq. See generally Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 20 et seq.

26 The proprietary action was commenced by writ of right, and, although in the first instance within the jurisdiction of the manorial court, it might be removed into the King's court. The actions merely possessory were the assize of novel disseisin, introduced in 1166, and the assize of mort d'ancestor, introduced somewhat earlier. These gave a remedy for actual disseisin by the defendant, or for entry by a stranger on the death of the tenant. The writ of entry sur disseisin and other writs of entry were introduced for the purpose of extending the possessory remedies for disseisin and of making them available against persons claiming under the disseisor, and they tended to become proprietary without subjecting the claimant to the inconveniences of proprietary procedure. However, all these actions, including even the writ of right, were possessory in the sense that the question at issue was not whether the claimant was entitled against all the world, but whether he had better right (majus jus) than the defendant. As to these actions see 1 Pollock and Maitland's History of English Law (2nd Edn) 145 et seq, 587; 2 Pollock and Maitland's History of English Law (2nd Edn) 46 et seq; 3 Holdsworth's History of English Law 5 et seq. See also Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 26 et seq.

27 1 Pollock and Maitland's History of English Law (2nd Edn) 361, 588. The assize of novel disseisin was expressly restricted to disseisin of the freehold: 1 Pollock and Maitland's History of English Law (2nd Edn) 359 note (3).

28 Digby's History of the Law of Real Property (5th Edn) 291; Littleton's Tenures s 77.

29 See 1 Pollock and Maitland's History of English Law (2nd Edn) 369, 375; 2 Bl Com (14th Edn) 89, 90. As to copyholds generally see PARA 31 et seq post; and CUSTOM AND USAGE.

30 Coke's Compleat Copy-holder ss 8, 9. See also 3 Holdsworth's History of English Law 198 et seq.

6. Estates of inheritance; escheat and reverter.

Under the feudal system the grant of a fee conferred an interest which was capable of being inherited[1], and this was so distinctive a feature of such grants that the word 'fee' came to denote heritability[2]. The grant might be restricted to the life of the grantee, but, in most cases, the tenant held 'in fee', and on his death the land devolved upon his heirs. When the grant was recorded in a charter or deed, the heritability was expressed by making the grant to the donee and his 'heirs'[3], and the rule came to be established that a reference to 'heirs' was necessary to give a heritable fee and that a grant to the donee without such reference gave only an estate

for life[4]. The interest of the grantee, considered in respect of its duration, was known as his estate in the land[5].

An estate in fee was capable of unlimited duration, but, if in fact it came to an end by failure of heirs of the donee or his grantee, the land went back to the lord, who was then said to take by escheat[6]. This was the necessary result of the want of a tenant. An estate for life was in its nature limited, and on the death of the donee the land went back to the donor in accordance with the intention of the gift. This was described not as escheat, but as reverter[7].

1 2 Bl Com (14th Edn) 56; 1 Pollock and Maitland's History of English Law (2nd Edn) 314.

2 1 Pollock and Maitland's History of English Law (2nd Edn) 235; Digby's History of the Law of Real Property (5th Edn) 95.

3 Digby's History of the Law of Real Property (5th Edn) 60.

4 Littleton's Tenures s 1; 1 Pollock and Maitland's History of English Law (2nd Edn) 308. See also PARA 93 post.

5 For the meaning of 'estate' for these purposes see PARA 2 text and note 1 ante.

6 1 Pollock and Maitland's History of English Law (2nd Edn) 351. As to the abolition of the commonest forms of escheat see PARA 254 post.

7 1 Pollock and Maitland's History of English Law (2nd Edn) 308; 2 Pollock and Maitland's History of English Law (2nd Edn) 7. See also PARA 163 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(2) THE COMMON LAW/(i) The Feudal System/7. Subinfeudation and its abolition.

7. Subinfeudation and its abolition.

The tenant of land could grant a part of it to be held of himself as lord, and by this process of subinfeudation one or more mesne lordships or seigniories might be established[1]. Where there were several free tenants holding under the same lord, the lord, as an incident of this system of tenure, had rights of civil jurisdiction over them; and by special grant from the Crown or by prescription he might have rights of criminal jurisdiction. He might also have villein, or unfree, tenants holding land at his will (afterwards copyholders[2] holding at his will according to the custom of the manor) and over these, also, he had jurisdiction[3]. In addition he might retain land, his demesne land, in his own occupation. An estate large enough to have these various incidents, free tenants, villein tenants, demesne land and a local court, was known as a 'manor'[4].

The chief cause of damage to lords by subinfeudation was in the loss of the profits of escheats, marriages and wardships[5]. The Statute Quia Emptores[6] recites to this effect, and provides that from thenceforth it should be lawful for every freeman to sell at his will his land or tenement or part of it, so, however, that the feoffee (or purchaser) should hold the land or tenement of the next superior lord by the same services and customs by which the feoffor (or seller) previously held them[7]. Where a part only of the land was sold the services were apportioned according to the value of the land sold[8]. The statute did not authorise the sale of land into mortmain[9] contrary to the statutes in that behalf, and applied only to land held in fee simple[10]. Thus, it did not prevent the grant of an estate for life or in tail to be held of the grantor[11]. Although the statute speaks only of the sale of land, it has been construed as extending to grants of land generally[12], and since 1290 it was impossible for a tenant in fee simple to convey his land to a grantee in fee simple so as to create a tenure between himself and the grantee. Any rents or

other services incident to tenure, and due from an owner in fee simple to a lord other than the Crown, must have been created before that year[13].

1 See 1 Pollock and Maitland's History of English Law (2nd Edn) 233, where an instance of eight successive subinfeudations is given. The actual tenant of the land held in dominio; the mesne lord in servitio. The tenants of the Crown were usually known as tenants in capite, but this was in fact a relative term (2 Co Inst 501), and each tenant held in capite of the lord immediately above him: 1 Pollock and Maitland's History of English Law (2nd Edn) 233 note (3).

2 As to copyholds and the nature of manors and manorial customs see CUSTOM AND USAGE.

3 Private jurisdiction was an essential element in feudalism. Originally there was, perhaps, only one court for free and non-free tenants: see 1 Pollock and Maitland's History of English Law (2nd Edn) 43-44, 571 et seq, 593. Subsequently there were two courts, the court baron for the freeholders, and the customary court for the copyholders: Digby's History of the Law of Real Property (5th Edn) 52 et seq. See further CUSTOM AND USAGE.

4 1 Pollock and Maitland's History of English Law (2nd Edn) 596 et seq. The term was at first indefinite, and a manor did not necessarily require all these incidents. As to honours and manors see CUSTOM AND USAGE. Except in Ireland and in a few cases in the North of England, such as the Honour of Clitheroe, honours are practically extinct.

5 1 Pollock and Maitland's History of English Law (2nd Edn) 330; Challis's Law of Real Property (3rd Edn) 18.

6 Ie 18 Edw 1 (Quia Emptores) (1289-90) c 1.

7 Ibid c 1; 3 Holdsworth's History of English Law 80-81. 'Customs' is here synonymous with 'services': 2 Co Inst 502. The statute rendered unnecessary a licence for alienating from a mesne lord, but did not affect the Crown, and consequently Crown tenants still required a licence. By 1 Edw 3 stat 2 (Tenure in capite, etc) (1327) c 12 (repealed), it was provided that the penalty for alienation without licence should be a reasonable fine and not forfeiture, and such fines continued until the Tenures Abolition Act 1660: see 1 Pollock and Maitland's History of English Law (2nd Edn) 338; Co Litt 43b. It seems that the Statute Quia Emptores forbade also subinfeudations by the Crown's tenants in capite ut de corona; but, if it did not, they were impliedly declared invalid by 34 Edw 3 c 15 (Alienation of Crown Lands) (1360-61) (repealed), which confirmed subinfeudations made by tenants in chief under Henry III and his predecessors: *Re Holliday* [1922] 2 Ch 698.

8 18 Edw 1 (Quia Emptores) (1289-90) c 2. That is, if the services were apportionable; otherwise the services might, according to the circumstances, be due, after alienation, from each tenant or from one only; and in that case the one who did the service might be entitled to contribution from the others. As to whether services would be multiplied on alienation of part or not, and as to contribution, see *Bruerton's Case* (1594) 6 Co Rep 1a; *Talbot's Case* (1610) 8 Co Rep 104b. In these respects there was no difference between annual services and occasional services, such as heriots: *Talbot's Case* supra. As to the effect of a purchase by the lord of a part of the land in extinguishing the entire services see *Bruerton's Case* supra; *Talbot's Case* supra. The apportionment of services was according to 'quantity', but this referred to value: 2 Co Inst 503.

9 As to the repeal of the law of mortmain see CHARITIES vol 8 (2010) PARAS 82-83.

10 18 Edw 1 (Quia Emptores) (1289-90) c 3. See also Digby's History of the Law of Real Property (5th Edn) 238.

11 Consequently, an estate for life or in tail could be granted reserving a rent: Littleton's Tenures s 214. If the grant was for life or in tail only, the reversion in fee simple remaining in the grantor, the tenure was necessarily of the grantor; but if the remainder in fee was also granted nothing remained in the grantor, and the persons claiming under the grant held of the superior lord: *Anon* (1578) 3 Dyer 362b (19); Littleton's Tenures s 215; 2 Co Inst 505; Challis's Law of Real Property (3rd Edn) 22; Digby's History of the Law of Real Property (5th Edn) 237 note (2).

12 2 Co Inst 500.

13 In as much as no fresh mesne tenures have been able to be created since 1290, and existing tenures are from time to time extinguished, 'the seigniory of all freehold lands held for a fee simple tends to become concentrated in the Crown': Challis's Law of Real Property (3rd Edn) 22. See also *Re Lowe's Will Trusts, More v A-G* [1973] 2 All ER 1136, [1973] 1 WLR 882, CA. As to the effect of 18 Edw 1 (Quia Emptores) (1289-90) see Digby's History of the Law of Real Property (5th Edn) 235; 3 Holdsworth's History of English Law 80-81. As to the possibility of the creation of manors since the Statute Quia Emptores see Challis's Law of Real Property (3rd Edn) 21. As to manors generally see CUSTOM AND USAGE.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(2) THE COMMON LAW/(i) The Feudal System/8. Power of alienation.

8. Power of alienation.

Either originally or at an early date the tenant had power to alienate the entirety of his holding so as to substitute the grantee for himself as tenant to the immediate lord[1], but, since he could not require the lord to accept an apportionment of the services, he could not alienate in this way a part of his holding[2]. If he wished to make an effective grant of a part, he could do so only by subinfeudation[3]. However, subinfeudation prejudiced the superior lord in the enjoyment of his feudal dues[4], and it was first checked[5] and then entirely abolished, by statute, while, on the other hand, the right of alienation by substitution of another as tenant was confirmed and extended to alienation of a part only of the holding[6].

1 Bract lib ii c 35, fol 81; Co Litt 43a. See also Digby's History of the Law of Real Property (5th Edn) 157-161. Blackstone, however, following Wright (see Wright's Tenures (2nd Edn) 154), perhaps with more regard to theory than history, considers that the fee could not be alienated without the consent of the lord, such an alienation being opposed to the nature of the feudal relation of lord and vassal: 2 Bl Com (14th Edn) 57, 287. See further the discussion of the question in 1 Pollock and Maitland's History of English Law (2nd Edn) 329 et seq. It seems that, after alienation by the tenant of his holding, the lord could still require the services from the original tenant: 2 Co Inst 500.

2 Co Litt 43a; 2 Co Inst 65.

3 As to subinfeudation see generally para 7 ante.

4 As to subinfeudation prejudicing the superior lord's enjoyment of feudal dues see PARA 7 ante.

5 Ie by 1 Hen 3 (Magna Carta) (1217) c 39, which provided that no freeman should thenceforth 'give or sell' more of his land than that, out of the residue, there might sufficiently be done to the lord of the fee the service due to him in respect of the fee; repeated in 9 Hen 3 (Magna Carta) (1224) c 32, and amended by 18 Edw 1 (Quia Emptores) (1289-90) c 2: see Digby's History of the Law of Real Property (5th Edn) 133; Challis's Law of Real Property (3rd Edn) 19. The words of the statute are not clear, but it seems to have been aimed at subinfeudation and not alienation: see 2 Bl Com (14th Edn) 289. As to a feoffment in breach of the statute see Co Litt 43a; 2 Co Inst 66. It seems that it could be avoided by the heir of the donor and also by the donor's lord (1 Pollock and Maitland's History of English Law (2nd Edn) 332; Digby's History of the Law of Real Property (5th Edn) 157), and the practical effect of the statute was to enable the lords to exact a fine for licence to assign (Challis's Law of Real Property (3rd Edn) 21). In regard to land held of the Crown, a prerogative right was asserted and gradually established that the land could not be alienated without the monarch's consent. As to the growth of this right see 1 Pollock and Maitland's History of English Law (2nd Edn) 335 et seq; 3 Holdsworth's History of English Law 83 et seq; and also Co Litt 43b.

6 18 Edw 1 (Quia Emptores) (1289-90) c 1. See generally 3 Holdsworth's History of English Law 79 et seq; Williams on the Law of Real Property (24th Edn) 97 et seq.

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9. Origin and nature of leasehold tenure.

At an early date, leases for terms of years became common[1], but they formed no part either of the feudal system, which was based on military tenure, or of the original agricultural system, which produced socage and villein tenure. They were, perhaps, introduced as a means of

raising money[2], and they became one of the ordinary means of securing a substantial rent from the land[3]. In their legal incidents, however, terms of years differed from other interests in the land. They conferred no freehold[4], and they did not entitle the termor to the ordinary possessory remedies, these being only available for freeholders[5]. The termor's remedy at first was a personal one against the lessor in covenant, if he was ejected by the lessor; on the warranty, perhaps, if he was ejected by a stranger[6]. Ultimately the law allowed him the legal advantages of possession. 'Seisin', which had been used indifferently for any possession, was confined to the freeholder; 'possession' was ascribed to the termor[7]; and, if the termor was dispossessed, he could recover possession in an action of ejectment[8].

The term of years, being fully protected, conferred an estate in the land, and the analogy of freehold estates was followed so far that fealty was said to be due from the lessee to the lessor[9]. So, it became technically correct to speak of leasehold tenure[10]. The analogy did not, however, prevail as to devolution on death, and terms of years went to the executor or administrator, and not to the heir[11].

1 Apparently they were in common use towards the end of the twelfth century: 2 Pollock and Maitland's History of English Law (2nd Edn) 111.

2 For examples of this see 2 Pollock and Maitland's History of English Law (2nd Edn) 111; and 3 Holdsworth's History of English Law 129.

3 In this respect they were analogous to tenancies at fee farm rents, but these latter tenancies were estates of freehold and became merged in socage tenure: see PARA 5 ante.

4 Ie liberum tenementum: see Bract lib ii c 9, fol 27; 2 Pollock and Maitland's History of English Law (2nd Edn) 113; 2 Holdsworth's History of English Law 205; 3 Holdsworth's History of English Law 213 et seq.

5 As to the availability of possessory remedies to freeholders only see PARA 5 text and note 26 ante.

6 2 Pollock and Maitland's History of English Law (2nd Edn) 106.

7 2 Pollock and Maitland's History of English Law (2nd Edn) 36, 109 et seq; and see at 114, where it is suggested that the former refusal of possession to the termor was by analogy with the Roman law, which refused possessio civilis to the lessee (conductor) of land. The English feeling in favour of the protection of possession was, however, too strong for this refusal to last.

8 As to the evolution of the termor's remedies see 2 Pollock and Maitland's History of English Law (2nd Edn) 106 et seq; 3 Holdsworth's History of English Law 213 et seq. Ultimately the termor had, in the writ of ejectment, the better remedy, and freeholders adopted it by a series of fictions: see *Doe d Poole v Errington* (1834) 1 Ad & El 750 at 755-757.

9 Co Lit 67b, 93b.

10 See Littleton's Tenures s 132; Co Litt 67b, 93b. See further Challis's Law of Real Property (3rd Edn) 424-427.

11 The reason for this does not seem to have been clearly traced. Possibly it was because the action on the covenant, which originally formed the termor's remedy, was a personal remedy; possibly because the term was purchased for money and represented money: see 2 Pollock and Maitland's History of English Law (2nd Edn) 116; and EXECUTORS AND ADMINISTRATORS.

10. Abolition of the feudal system.

By the fourteenth century tenure by knight service had ceased to serve its original purpose[1], but its casual pecuniary products, in particular wardship and marriage, and, as regards tenants of the Crown, fines on alienation, kept it alive for some three hundred years longer. In 1541 it was made more oppressive by the establishment of the Court of Wards and Liveries[2], but this form of tenure was abolished by resolution of Parliament in 1645, and the abolition was confirmed by statute in 1656 and more formally in 1660[3]. The Tenures Abolition Act 1660[4] provided that the Court of Wards and Liveries and the special incidents, wardships[5], liveries, primer seisins, and value of marriages, of tenure by knight service, whether held under the King or a mesne lord, and also fines for alienation and homage, should be taken away and discharged; that such tenure should be turned into free and common socage[6]; and that all future tenures upon the grant by the King of hereditaments for an estate of inheritance should be in free and common socage, and should be discharged from the incidents of tenure by knight service[7]. The incidents of tenure by knight service which were suitable to socage tenure, fealty, rents certain, heriots and suit of court, were, however, preserved, and also relief, which was directed to be paid in the same manner as in socage tenure[8]; and the abolition of fines on alienation only applied to land held in capite of the King, not to fines for alienation due by the custom of particular manors and places[9]. The Tenures Abolition Act 1660 did not interfere with tenure in frankalmoin, or tenure by copy of court roll, and, as regards grand serjeanty, it abolished only wardship, marriage and other burdens incident to the tenure as a military tenure, and did not take away the honorary services[10]. Tenure in frankalmoin has, however, ceased to be possible[11], and copyhold tenure has been abolished[12]; so that, apart from tenure by grand serjeanty, which has ceased to be of practical importance, all land except leaseholds is of socage tenure.

1 See 1 Pollock and Maitland's History of English Law (2nd Edn) 252-253; 3 Holdsworth's History of English Law 73; and PARA 5 ante.

2 The court was established by 32 Hen 8 c 46 (Court of Wards) (1540) (repealed). See also Digby's History of the Law of Real Property (5th Edn) 393. For a description of the manner in which the feudal system had become, since the decay of its primary purpose, a means of gross oppression see 2 Bl Com (14th Edn) 75-76.

3 See 2 Bl Com (14th Edn) 77; 6 Holdsworth's History of English Law 166.

4 The Tenures Abolition Act 1660 has, with the exception of s 4, been repealed. In *A-G for Alberta v Huggard Assets Ltd* [1953] AC 420, [1953] 2 All ER 951, PC, it was held that the statute did not apply outside England and Wales.

5 As to the present jurisdiction in respect of wardships of minors and the care of their estates see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 218 et seq.

6 Tenures Abolition Act 1660 ss 1, 2 (repealed).

7 Ibid s 4.

8 Ibid s 5 (repealed).

9 Ibid s 6 (repealed).

10 Ibid s 7 (repealed). These services were saved again on the general abolition of customary services: see the Law of Property Act 1922 s 136 (repealed).

11 Such tenure is now impossible because of the repeal, save where death occurred before 1926, of the Tenures Abolition Act 1660 s 7 (as regards frankalmoin) by the Administration of Estates Act 1925 s 56, Sch 2 Pt I.

12 As to the abolition of copyhold tenure see PARA 31 et seq post.

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(ii) Special Local Tenures

11. Development of local tenures.

Tenure in common socage was generally subject to uniform rules, recognised by the common law or introduced by statute, as regards alienation, descent[1], the rights of husband and wife[2] and other matters; but, without ceasing to be common socage, it was capable of having special incidents attached to it by the custom of particular manors or districts. Thus arose the varieties of tenures known as ancient freeholds[3], tenure in ancient demesne[4], gavelkind[5] and borough english[6]. Ancient freeholds must be distinguished from customary freeholds[7], which were a form of copyhold tenure.

1 Descent is now abolished and replaced by the devolution of the real estate, as well as the personal estate, of an intestate on his personal representative for distribution, subject to payments made in administration, among the persons beneficially entitled: see the Administration of Estates Act 1925 ss 33, 45, 46 (as amended); and EXECUTORS AND ADMINISTRATORS.

2 As regards her property, the wife is now in the position of a feme sole: see PARA 230 post.

3 As to ancient freeholds see PARA 12 post.

4 As to tenure in ancient demesne see PARA 13 post; and CUSTOM AND USAGE.

5 As to gavelkind see PARA 14 post.

6 As to borough english see PARA 15 post.

7 Customary freeholds were also known as 'privileged copyholds', and in the north of England the tenure was known as 'tenant right'. See further CUSTOM AND USAGE. As to the descent of customary freeholds before 1926 see EXECUTORS AND ADMINISTRATORS.

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12. Ancient freeholds.

Where land held of a manor was subject to customary incidents as regards alienation or otherwise, but the tenure was not expressed to be at the will of the lord, and admittance was not necessary to complete the title of the alienee, the land was usually of freehold tenure, and was known as 'ancient freehold'[1]. The discharge of custom by the Law of Property Act 1922 extended to land held in free tenure but subject to custom[2].

Since the freehold was in the tenant, the seigniory of the land was parcel of the manor, but the land itself was not[3]. The tenure of land is presumed to be freehold held directly of the Crown if there is no evidence to the contrary[4].

1 *Passingham v Pitty* (1855) 17 CB 299, where the tenants in fee held of the lord 'by free deed, fealty, suit of court', and a nominal yearly rent, and could alienate by ordinary assurances without licence or enrolment; but the new owner could be compelled by distress to come in and acknowledge free tenure. It was essential to the

existence of a manor that there should be at least two freehold tenants to constitute the court baron: see CUSTOM AND USAGE. Heriots might be due from freehold tenants. As to heriots generally see CUSTOM AND USAGE.

2 See the Law of Property Act 1922 s 128(3) (repealed); and PARA 33 post.

3 See Scriven's Law of Copyholds (4th Edn) 567 note (x).

4 *Busher v Thompson* (1846) 4 CB 48; *Re Lowe's Will Trusts, More v A-G* [1973] 2 All ER 1136, [1973] 1 WLR 882, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(2) THE COMMON LAW/(ii) Special Local Tenures/13. Tenure in ancient demesne.

13. Tenure in ancient demesne.

Manors of ancient demesne were manors which belonged to the Crown in the time of Edward the Confessor or William I; and the freehold tenants of these manors were known as 'tenants in ancient demesne'[1].

1 2 Co Inst 542; 4 Co Inst 269; *Hunt v Burn* (1701) 1 Salk 57. The evidence of Domesday Book is both necessary and conclusive to prove that a manor was ancient demesne (3 Holdsworth's History of English Law 263-264; Scriven's Law of Copyhold (4th Edn) 479), but whether particular land was parcel of such a manor was a matter for ordinary evidence (Scriven's Law of Copyholds (7th Edn) 35-36, 478 et seq). Customary freeholds were said to exist most usually in manors of ancient demesne: Coke's Compleat Copy-holder s 22. As to tenure in ancient demesne and the special incidents attached to this tenure see generally *Iveagh v Martin* [1961] 1 QB 232 at 261-262, [1960] 2 All ER 668 at 676-677; and see further CUSTOM AND USAGE.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(2) THE COMMON LAW/(ii) Special Local Tenures/14. Custom of gavelkind.

14. Custom of gavelkind.

'Gavelkind' was not, properly speaking, the name of a tenure, but it denoted certain special customs which affected land of socage tenure in Kent and elsewhere[1]. The chief of these customs related to descent. On the death of the owner intestate, primogeniture was excluded, and there was equal division of descendible estates among all the sons or other male heirs[2]. Other customs existing up to 1 January 1926[3] were as follows: (1) tenancy by the curtesy was in one-half the land, did not depend on birth of heritable issue, and ceased on remarriage[4]; (2) dower was in one-half the land and continued while the widow remained chaste and unmarried[5]; and (3) a minor could alienate his land by feoffment after attaining the age of 15 years, but it was necessary to show that he received full consideration, and he had to make the feoffment in person[6].

The custom of gavelkind differs from special customs in that it is not necessary to allege and prove the nature of the custom as regards descent[7]. This is a matter of law[8]. The incidental customs relating to curtesy, dower and alienation should be specially alleged[9], and must be proved if alleged to be incident to gavelkind land elsewhere[10] than in Kent[11].

There have been various statutes disgavelling particular land in Kent[12], but these operated only as to the mode of descent and not as to the other incidents of gavelkind[13]. However, it was difficult to identify the land comprised in the statutes, and consequently the disgavelled land

tended to fall within the custom again[14]. When gavelkind land passed into the ownership of the Crown the custom was suspended, not extinguished, and revived if the land was regranted to a subject[15]. Gavelkind could not be extinguished by prescription[16], nor could the owner alter the course of descent[17]; but if, under a limitation to the 'right heirs' of a man, the right heirs took by purchase, the term was construed to mean the heirs at common law[18].

1 See Challis's Law of Real Property (3rd Edn) 14. It was a species of socage tenure modified by the custom of the country: 2 Bl Com (14th Edn) 85. 'Gavelkind' (according to Sir E Coke's simple mode of etymology, 'gave all kinde; for the custome giveth to all the sonnes alike': Co Litt 140a) is derived from gafol (rent), and meant originally rent-paying land: 2 Pollock and Maitland's History of English Law (2nd Edn) 271 et seq; Robinson's Gavelkind (5th Edn) 1 et seq; 3 Holdsworth's History of English Law 259 et seq. Before the Norman Conquest the equal partibility of land among sons was the general custom of the realm, and at first continued as to socage land after the Conquest: *Clements v Scudamore* (1703) 6 Mod Rep 120; Robinson's Gavelkind (5th Edn) 16. Primogeniture was introduced to suit the supposed necessities of military tenure (Robinson's Gavelkind (5th Edn) 17), and, save in Kent and certain other places, socage land became subject to this rule; but in Kent the original custom survived (2 Bl Com (14th Edn) 84). The custom of gavelkind did not apply to land purchased by the Crown: Co Litt 15b; *Willion v Berkley* (1561) 1 Plowd 223 at 227, 247. In Kent the term 'frank fee' was sometimes applied to freehold land not subject to gavelkind: Robinson's Gavelkind (5th Edn) 49. As to the effect of purchase of freehold land by the lord see Robinson's Gavelkind (5th Edn) 64.

It is presumed that all land in Kent was subject to the custom of gavelkind unless the contrary is proved: *Wiseman v Cotten* (1663) 1 Sid 135 at 138; *Burridge v Earl of Sussex* (1709) 2 Ld Raym 1292. 'The customs of gavelkind differ from the customs of a particular fee; to say on evidence lands are in Kent puts the other side to prove they are not departible, but in particular fees the party must plead that the lands within that fee are time out of mind gavelkind partibilia and partita': *Randall v Writtall* (1672) 3 Keb 214 at 216 per Hales CJ; *Gouge v Woodwin* (1734) Robinson's Gavelkind (5th Edn) 44. 'The custom of gavelkind [is] in fact the common law of the land in Kent': *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488 at 494 per Farwell J. Thus in pleading it is sufficient to allege that the land is in Kent and was subject to that custom. It is not necessary to prove the existence of the custom, or that the particular land had ever been in fact divided according to the custom: Littleton's Tenures s 265; Co Litt 175b; *Browne v Brokes* (1659) 2 Sid 153; *Humfry v Bathurst* (1684) Lut 740 at 754-755. As to land elsewhere which is alleged to have been subject to the custom, proof of the allegation must be given ('In no county of England lands at this day be of the nature of gavelkind of common right, saving in Kent only': Co Litt 140a). It has been said that the custom can only exist in a city or borough or in a manor: Co Litt 110b. See also Co Litt 110b note (2). As to places where it has been proved or said to exist see Robinson's Gavelkind (5th Edn) 33 et seq; *Tannworth v Tannworth* (1589) Gouldsb 105.

The custom of gavelkind attached not only to estates in fee but also to estates in tail (Littleton's Tenures s 265; Co Litt 10a, Hargrave's note (3). See also *May v Milton* (1556) Dyer 133b (5); *Roe d Clement v Briggs* (1812) 16 East 406; Robinson's Gavelkind (5th Edn) 94) and to other estates of a descendible nature (eg a lease for lives: *Baxter v Dowdswell* (1675) 2 Lev 138; *Clements v Scudamore* (1703) 2 Ld Raym 1024 at 1028 per Holt CJ). As to the abolition of the custom of gavelkind as regards deaths occurring after 1925 see PARA 15 text and note 6 post. The custom was not restricted to common law estates in land of which the owner was actually seised. It applied to every legal interest in the land, such as a contingent remainder (*Rider v Wood* (1855) 1 K & J 644; Williams's Seisin of the Freehold 94) which could be claimed by an heir (*Payne v Barker* (1662) O Bridg 18 at 30). It is otherwise regarding land taken under an executory devise: *Mallinson v Siddle* (1870) 39 LJ Ch 426. The custom applied to estates arising under the Statute of Uses (see Co Litt 23a. Cf *Randall v Writtall* (1672) 3 Keb 214 at 215, referring to *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a); to estates arising in equity, such as trusts and equities of redemption, since in such matters equity followed the law (*Banks v Sutton* (1732) 2 P Wms 700 at 713; *Cowper v Earl Cowper* (1734) 2 P Wms 720 at 736; *Fawcet v Lowther* (1751) 2 Ves Sen 300 at 303; *Buchanan v Harrison* (1861) 1 John & H 662 at 676; Co Litt 13a. See also EQUITY vol 16(2) (Reissue) PARA 554-555, 605); and also to rents created out of gavelkind land (*Payne v Barker* (1662) O Bridg 18 at 30; *Randall v Writtall* (1672) 3 Keb 214 at 216; *Stokes v Verryer* (1674) 3 Keb 292; *Clements v Scudamore* (1703) 2 Ld Raym 1024 at 1028 per Holt CJ; Robinson's Gavelkind (5th Edn) 84). As to rights of common and tithes affecting gavelkind lands see Robinson's Gavelkind (5th Edn) 86-87. Where a lease included land held in common socage and gavelkind land, on the descent of the land the rent and conditions could be apportioned: Co Litt 215a; *Dumpor's Case* (1603) 4 Co Rep 119b at 120b.

2 Littleton's Tenures ss 210, 265. As to descent in gavelkind see generally EXECUTORS AND ADMINISTRATORS. As to the descent of estates in reversion or remainder see Robinson's Gavelkind (5th Edn) 79. The heirs in gavelkind were entitled to the remedies of co-owners for partition or sale of the land. In this respect they stood on the same footing as coparceners at common law. As to partition and modes of affecting partition see PARAS 215-216 post; and as to coparceners generally see PARAS 224-226 post.

3 As to the abolition of the custom of gavelkind as regards deaths occurring after 1925 see PARA 15 text and note 6 post.

4 As to estate by the curtesy see PARA 157 et seq post.

5 As to estate in dower see PARA 161 post.

6 Conveyance by feoffment has been abolished (see the Law of Property Act 1925 s 51(1)); and a minor is now incapable of holding a legal estate in land (see s 1(6)). Other customs were that the land was not forfeited for capital felony, but passed on the execution of the father to the son (commemorated in the rhyme 'the father to the bough, the son to the plough') and that it was devisable by will: see Robinson's Gavelkind (5th Edn) 41, 176, 185; 2 Bl Com (14th Edn) 84.

7 *Payne v Barker* (1662) O Bridg 18 at 30; *Clements v Scudamore* (1703) 6 Mod Rep 120 (borough english); *Rider v Wood* (1855) 1 K & J 644 (borough english). See also CUSTOM AND USAGE.

8 *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488. In regard to special customs generally, which vary the common law, the custom applies no further than it is strictly proved: *Muggleton v Barnett* (1857) 2 H & N 653, Ex Ch. As to proof of custom see generally CUSTOM AND USAGE. As to special customs of descent in manors see *Locke v Colman* (1837) 2 My & Cr 635; and as to manorial customs generally see CUSTOM AND USAGE.

9 *Launder v Brooks* (1639) Cro Car 561; *Browne v Brokes* (1659) 2 Sid 153; *Wiseman v Cotten* (1663) 1 Sid 135; Co Litt 175b note (4).

10 Robinson's Gavelkind (5th Edn) 11.

11 See Robinson's Gavelkind (5th Edn) 8 et seq.

12 Gavelkind did not attach to land held anciently by military tenure (*Gouge v Woodwin* (1734) Robinson's Gavelkind (5th Edn) 44; 2 Co Inst 595), but land in Kent was presumed to be of socage tenure until the contrary was proved (see *Doe d Lushington v Lord Bishop of Llandaff* (1807) 2 Bos & PNR 491). As to when a grant by the Crown created tenure by knight service see *Wheeler's Case* (1601) 6 Co Rep 6b; *Lowe's Case* (1609) 9 Co Rep 122b. As to tenure by knight service see PARA 5 ante.

13 *Wiseman v Cotten* (1663) 1 Sid 135. For the disgavelling Acts and their effect see Robinson's Gavelkind (5th Edn) 67 et seq; Co Litt 140b. As to the abolition of the custom of gavelkind as regards deaths occurring after 1925 see PARA 15 text and note 6 post.

14 See *Wiseman v Cotten* (1663) 1 Sid 135 at 138.

15 *Wiseman v Cotten* (1663) 1 Sid 135 at 138. Similarly, before the abolition of military tenures, upon gavelkind land escheating to a lord holding in chivalry, the gavelkind custom was suspended only, and not destroyed; but the Crown on regranting land could not create the custom of gavelkind: see *Wiseman v Cotten* supra. As to burgage tenure see *May and Bannister v Street* (1588) Cro Eliz 120.

16 Robinson's Gavelkind (5th Edn) 54.

17 Thus, when a fine of ancient demesne land levied in the Common Pleas turned the tenure into frank fee, this did not, if the lands were gavelkind, get rid of the custom (*Anon* (1549) 1 Dyer 72b (4)); and if the tenure of socage land was changed to military tenure, this also did not affect the custom (*Dickson's Case* (1627) Het 64 at 65; *Doe d Lushington v Lord Bishop of Llandaff* (1807) 2 Bos & PNR 491).

18 *Counden v Clerke* (1613) Hob 29 at 31; *Doe d Long v Laming* (1760) 2 Burr 1100 at 1106; Robinson's Gavelkind (5th Edn) 101. In general 'right heirs' are words of limitation: Co Litt 22b. See also PARA 93 post.

15. Borough english.

Borough english was a custom by which the youngest son inherited to the exclusion of his elder brothers[1]. It resembled gavelkind in that it affected land held in socage. It was sometimes associated with burgage tenure, that is the tenure by which the inhabitants of certain ancient boroughs held their tenements of the King or some other lord by a fixed annual rent[2]. However, the custom was not confined to boroughs; it was also found in rural manors[3]. The law takes

notice of the nature of the custom so far as regards descent on the youngest son[4], and generally the same considerations apply to borough english as to gavelkind[5]; but any extensions of the custom to other relatives, or any incidental customs, must be proved.

The customs of gavelkind and borough english have been abolished as regards deaths occurring after 1925[6].

1 Littleton's Tenures ss 165, 211. As to descent in borough english see also EXECUTORS AND ADMINISTRATORS.

2 Littleton's Tenures ss 162-164; *Reve v Malster and Barrow* (1635) Cro Car 410. As to burgage tenure and its connection with the growth of boroughs see 1 Pollock and Maitland's History of English Law (2nd Edn) 295, 645. The term 'borough english' has been attributed to the fact that the custom is exclusively English (Co Litt 110b), but it has been suggested that it came from Nottingham, where there were French and English boroughs side by side, and to have arisen from the necessity of distinguishing the customs of the English borough, which included the custom in question, from those of the French borough. Consequently, the custom was called 'borough english': 1 Pollock and Maitland's History of English Law (2nd Edn) 647; Robinson's Gavelkind (5th Edn) 230; 3 Holdsworth's History of English Law 53, 271.

3 1 Pollock and Maitland's History of English Law (2nd Edn) 647. As to where the custom prevailed see Robinson's Gavelkind (5th Edn) 238 et seq. It is said to have prevailed in Leicester, Derby, Stamford, Stafford and Gloucester, and at Kendal (*Johnson v Clark* [1908] 1 Ch 303), but to have been extinct in Nottingham.

4 Co Litt 175b. See also PARA 14 text and notes 8-11 ante; and see generally CUSTOM AND USAGE.

5 *Clements v Scudamore* (1703) 2 Ld Raym 1024. See also PARA 14 ante.

6 On the general enfranchisement of land of copyhold or customary tenure, the land was not to be subject to the custom of borough english, or of gavelkind, or to any other customary mode of descent (Law of Property Act 1922 s 128(2), Sch 12 para (1)(d) (repealed)); and the customs of gavelkind and borough english and all other customs of descent have been abolished for freehold land generally: see the Administration of Estates Act 1925 s 45(1)(a). As to the general statutory enfranchisement see PARA 31 et seq post.

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(3) THE INFLUENCE OF EQUITY

(i) Uses apart from the Statute of Uses

16. The origin of the use.

Alongside the common law system of estates and tenures[1] there grew up a more flexible system of equitable interests in land. If land was conveyed to one person and his heirs to the use[2] of another before the Statute of Uses[3], the use was treated at law as repugnant to the previous limitation and void[4], but it was recognised and enforced in Chancery[5]. The use was defined as a trust or confidence not issuing out of the land, but a thing collateral, annexed in privity to the estate and the person of the legal owner, and touching the land, the effect of the use being that the person for whose benefit the use was created should take the profits and that the legal owner should convey according to his directions[6]. The person seised of the land was complete owner of the land at law[7], and the use was only cognisable in equity, the use before the Statute of Uses being the same as a trust thereafter[8].

1 As to tenures generally see PARA 4 et seq ante; and as to legal estates generally see PARA 91 et seq post.

2 This is not the Latin usus (meaning the act of employing a thing), but opus, derived through the Norman-French oes or oeps (meaning benefit): see Challis's Law of Real Property (3rd Edn) 385n; 4 Holdsworth's History of English Law 411 note (8); Maitland's Equity (2nd Edn) 24-25.

3 Statute of Uses (1535) (repealed without affecting its operation in regard to dealings taking effect before 1 January 1926: see the Law of Property Act 1925 s 1(10), s 207 (partially repealed), Sch 7 (repealed)).

4 It was held that he who had a use had *jus neque in re neque ad rem* (a right neither over a thing nor to a thing), but only a confidence and trust, for which he had no remedy at the common law, but only by subpoena in Chancery: *Brent's Case* (1583) 2 Leon 14 at 16; *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 121b. In the thirteenth century, however, there were cases of the common law courts taking cognisance of uses: see 4 Holdsworth's History of English Law 414 et seq.

5 There are records of uses being created both before and after the Norman Conquest, but in most cases these were for temporary purposes only: see 2 Pollock and Maitland's History of English Law (2nd Edn) 230, 233 et seq; 4 Holdsworth's History of English Law 412; 1 Sanders on Uses and Trusts (5th Edn) 6 et seq. Uses of a permanent nature became common with the arrival in England in about 1225 of the Franciscan friars, who were prevented by the rules of their Order from owning property, but might enjoy the use of it: see 2 Pollock and Maitland's History of English Law (2nd Edn) 231, 238. The jurisdiction of the Chancellor over the use seems to have developed towards the end of the fourteenth century: see 4 Holdsworth's History of English Law 420; Digby's History of the Law of Real Property (5th Edn) 321 et seq. As to the early history of uses see further *Brent's Case* (1583) 2 Leon 14 at 15 per Manwood J; Co Litt 191a, Butler's note vi 11; Leake's Law of Property in Land (2nd Edn) 78 et seq; Gilbert's Law of Uses and Trusts (3rd Edn) 1 et seq.

6 *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 121b; Co Litt 272b.

7 1 Sanders on Uses and Trusts (5th Edn) 67; Leake's Law of Property in Land (2nd Edn) 79. See also EQUITY vol 16(2) (Reissue) PARA 602. The legal estate in the feoffees to uses supported contingent uses, notwithstanding that there was no preceding estate of freehold in the use: *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 135a.

8 As to the exclusive jurisdiction of the Court of Chancery over uses see 1 Sanders on Uses and Trusts (5th Edn) 5, 19; Leake's Law of Property in Land (2nd Edn) 79; *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 218-219 per Lord Mansfield CJ. Although the person for whose benefit the use was created was said to have neither any estate in the land nor title to the land (see note 4 supra), his interest was at an early date treated as an estate in the land: *Brent's Case* (1583) 2 Leon 14 at 17 per Dyer CJ.

17. Essential conditions for the existence of a use.

For the raising and continuing of uses four things were necessary[1]:

1 (1) a person capable of being seised to a use; this required that the legal owner for the time being should be privy in estate to the original feoffee to uses and privy to the confidence reposed in that feoffee[2]; consequently a grantee from him for good consideration without notice was not seised to the use[3];

2 (2) a person capable of taking the use; it was the rule that all persons capable of taking a conveyance of land might take the same by way of use[4], and possibly also aliens were capable of taking the use[5];

3 (3) either a consideration to raise or a declaration of the use[6]; an express declaration of the use made on the occasion of a feoffment[7] did not depend for its effect on the presence or absence of a pecuniary consideration; but where there was no express declaration, the use, if a pecuniary consideration was paid by the feoffee, went to him; otherwise it resulted to the feoffor, who thereupon was in of his old use[8];

4 (4) a real hereditament in respect of which the use could arise, for personal hereditaments, such as annuities, were not the subject of uses[9].

Moreover, before the Statute of Uses[10], uses could not be imposed on the estates of limited owners, whether in tail or for life or for years[11].

1 1 Sanders on Uses and Trusts (5th Edn) 54 et seq.

2 As to livery of seisin and feoffment see PARAS 575-576 post.

3 *Brent's Case* (1583) 2 Leon 14 at 19 per Dyer CJ; *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 122a.

4 See note 3 supra.

5 *Brent's Case* (1583) 2 Leon 14 at 17.

6 1 Sanders on Uses and Trusts (5th Edn) 59. However, this was denied: Gilbert's Law of Uses and Trusts (3rd Edn) 86.

7 Gilbert's Law of Uses and Trusts (3rd Edn) 89.

8 1 Sanders on Uses and Trusts (5th Edn) 59-60.

9 1 Sanders on Uses and Trusts (5th Edn) 62.

10 Statute of Uses (1535) (repealed).

11 1 Sanders on Uses and Trusts (5th Edn) 28 et seq.

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18. The incidents of the use.

Since the rights of the person for whose benefit the use was created were not recognised at law[1], the use was not at first subject to the incidents attached to legal estates[2]. By conveying land to feoffees to uses, therefore, it was possible to circumvent the legal restrictions which prevented devises of land[3] and conveyances of land to religious bodies[4], to avoid liability to feudal burdens such as wardship, marriage, relief and primer seisin[5] and liability to forfeiture for treason[6], and to defraud creditors[7]. By legislation the person for whose benefit the use was created was in various respects made subject to the liabilities of the legal owner[8], and he was also given the power to make a conveyance of the legal estate in the land which would be valid against the feoffee to uses[9]. However, no fundamental change occurred in the relationship between the use and the legal estate until the enactment of the Statute of Uses[10].

1 As to such non-recognition at law see PARA 16 notes 4, 7 ante.

2 As to the incidents attached to legal estates see generally para 4 et seq ante.

3 Land was not devisable at common law: see 3 Holdsworth's History of English Law 75; 2 Pollock and Maitland's History of English Law (2nd Edn) 325.

4 7 Edw 1 (De Viris Religiosis) (1279) c 2 (repealed); 18 Edw 1 (Quia Emptores) (1289-90) c 3. As to mortmain see further PARA 253 note 1 post; and CHARITIES vol 8 (2010) PARAS 82-83.

5 As to the liability to feudal burdens see generally para 5 ante.

6 As to forfeiture for treason see generally para 253 note 1 post. Forfeiture for treason was a common incident during the civil wars of the fifteenth century (*Brent's Case* (1583) 2 Leon 14 at 16), and at that time the greater part of the land in England was said to be held in use (Co Litt 272a).

7 As to the consequences of putting lands in use see further Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 45 et seq; Maitland's Equity (2nd Edn) 26 et seq; 4 Holdsworth's History of English Law 432 et seq.

8 Eg 15 Ric 2 c 5 (Mortmain) (1391) (repealed) enacted that uses should be subject to the Statutes of Mortmain and be forfeitable like land (see *Brent's Case* (1583) 2 Leon 14 at 17 per Dyer CJ); 4 Hen 7 c 17 (Wardship) (1488) (repealed) attached the incidents of wardship and relief to uses of land held by knight service when the person for whose benefit the use was created died intestate; 26 Hen 8 c 13 (High Treason) (1534) s 5 (repealed) rendered uses forfeitable for treason (see *Brent's Case* supra at 19); 11 Hen 6 c 3 (Real Actions) (1433) (repealed) made the person for whose benefit the use was created for life or years liable for voluntary waste; and various statutes were enacted to check the disposition of land to uses in fraud of creditors. See further 1 Sanders on Uses and Trusts (5th Edn) 14 et seq; 4 Holdsworth's History of English Law 433 et seq.

9 1 Ric 3 c 1 (Felony) (1483) (repealed). The statute did not validate such conveyances against previous conveyances made by the feoffee to uses, and its effect was to introduce conflicts between purchasers under feoffees to uses and those under the person for whose benefit the use was created: 1 Sanders on Uses and Trusts (5th Edn) 21; Gilbert's Law of Uses and Trusts (3rd Edn) 51 et seq.

10 Statute of Uses (1535) (repealed). The Statute of Uses (1535) was rightly called 'the keystone of all modern conveyancing': Williams's Seisin of the Freehold 137. For the history of the statute, and as to documents connected with it, see 4 Holdsworth's History of English Law 449 et seq, 572, App III. Its repeal did not affect its operation in regard to dealings taking effect before 1 January 1926: see the Law of Property Act 1925 s 1(10). In consequence of the repeal, trusts are substituted for uses; the provisions in any statute or other instrument requiring land to be conveyed to uses take effect as directions that the land is, subject to creating or reserving out of it any legal estate authorised by the 1925 Act which may be required, to be conveyed to a person of full age upon the requisite trusts: see s 1(9).

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19. Creation of a use.

When the use was express it had to be in writing[1], and it might be declared by the statutory words 'use', 'confidence' or 'trust'[2], or by any other words showing an intention that the land should be held for the use of, or in trust for, another[3]. When no use was expressly declared, a use resulted to the grantor according to his original estate if the conveyance was without consideration[4], and it resulted to several conveying parties according to their respective interests in the old use[5]; but in the case of a conveyance by a tenant in tail barring his estate tail, the use resulted to him in fee simple[6]. Similarly, if only part of the use which the grantor was enabled to declare was disposed of, the part undisposed of resulted to him[7].

1 Statute of Frauds (1677) s 7 (repealed and replaced by the Law of Property Act 1925 s 53(1)(b)). See also 1 Sanders on Uses and Trusts (5th Edn) 218-219; and DEEDS AND OTHER INSTRUMENTS. However, the declaration might be by separate deed (1 Sanders on Uses and Trusts (5th Edn) 219; Gilbert's Law of Uses and Trusts (3rd Edn) 104 note (7)), although this was not the case in practice. A use arising or resulting by implication or construction of law was excepted from the Statute of Frauds (1677): see s 8 (repealed and replaced by the Law of Property Act 1925 s 53(2)).

2 The common law makes no distinction between trusts and confidences, and uses (*Lord Altham v Earl of Anglesey* (1709) Gilb Ch 16 at 17), and all these words express the same idea. A conveyance to A in fee in trust for B in fee vested the legal estate in B as much as if the words were 'to the use of': *Broughton v Langley* (1703) 2 Salk 679; *Eure v Howard* (1712) Prec Ch 338 at 345; *Doe d Leicester v Biggs* (1809) 2 Taunt 109; *Right d Phillipps v Smith* (1810) 12 East 455 at 461; 1 Sanders on Uses and Trusts (5th Edn) 95-96.

3 *Hammerston's Case* (1575) cited 2 Dyer 166a note (9); *Bettuans Case* (1576) 4 Leon 22; 1 Sanders on Uses and Trusts (5th Edn) 96; Gilbert's Law of Uses and Trusts (3rd Edn) 139 note (1). A special trust, ie a trust imposing active duties on the grantee, did not, however, operate as a use so as to vest the legal estate under the statute: 1 Sanders on Uses and Trusts (5th Edn) 253-254. See also *Re Sergie, Shribman v Hall* [1954] NI 1 at 23, NI CA. For the Statute of Uses (1535) (repealed) to operate, the person for whose benefit the use was created had to be entitled to possession or receipt of rents and profits, and to direct the disposal of the land: *Symson v Turner* (1700) 1 Eq Cas Abr 383n; *White v Parker* (1835) 1 Bing NC 573. Under a limitation, however, by deed 'unto and to the use of' trustees, the legal estate was vested by the statute in the trustees whatever was the nature of the trust: *Cooper v Kynock* (1872) 7 Ch App 398. As to the estate taken by trustees under devises see Underhill's Law of Trusts and Trustees (14th Edn) 386 (not reproduced in the 15th Edn).

4 1 Saunders on Uses and Trusts (5th Edn) 97; *Beckwith's Case* (1589) 2 Co Rep 56b at 58a note (t), Ex Ch; *Clere's Case* (1600) 6 Co Rep 17b (affd (1604) Cro Jac 31); *Armstrong d Neve v Wholesey* (1755) 2 Wils 19; *Doe d Dyke v Whittingham* (1811) 4 Taunt 20. The amount of the consideration was immaterial. The insertion of a nominal amount was sufficient to show an intention that no use should result: *Sutton's Hospital Case* (1612) 10 Co Rep 1a; *Barker v Keete* (1678) Freem KB 249; *Shortridge v Lamplough* (1702) 2 Ld Raym 798. This was the reason for the former insertion in deeds of a consideration of 5 shillings. The consideration need not be pecuniary. In covenants to stand seised the consideration was affection for a wife, child or some blood relation: see *Mildmay's Case* (1584) 1 Co Rep 175a; *Bedell's Case* (1607) 7 Co Rep 40a; and see further PARA 21 note 7 post.

5 1 Sanders on Uses and Trusts (5th Edn) 99; Gilbert's Law of Uses and Trusts (3rd Edn) 89 et seq.

6 *Dowman's Case* (1586) 9 Co Rep 7b at 8b (in the course of argument); *Martin d Tregonwell v Strachan* (1744) 5 Term Rep 107n at 110n, HL; *Tanner v Radford* (1833) 6 Sim 21 at 30. See also *Nightingale v Earl of Ferrers* (1733) 3 P Wms 206; 1 Sanders on Uses and Trusts (5th Edn) 99.

7 Co Litt 23a; and see at 271b; 1 Sanders on Uses and Trusts (5th Edn) 101. When a consideration was paid and only a part of the fee limited to the purchaser, the rest resulted to the grantor because the extent of the express limitation was the measure of the consideration; but, upon a conveyance to a purchaser for valuable consideration, reciting a contract for purchase of the absolute fee simple, any part of the use unlimited vested in the purchaser: see 1 Sanders on Uses and Trusts (5th Edn) 102. As to the case where the part disposed of was limited to the grantor himself, eg to himself for life see 1 Sanders on Uses and Trusts (5th Edn) 103-104.

(ii) The Statute of Uses

20. Purposes of the Statute of Uses.

The Statute of Uses[1], which was passed in order to put an end to the division between the legal and beneficial interest in land and to join the legal estate in the land to the use[2], provided[3] that where any person or persons[4] were seised of any hereditaments[5] to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any agreement, conveyance or will[6], then every and all such person and persons and bodies politic that had any such use, confidence or trust in fee simple, fee tail, or for term of life or for years, or otherwise, or in remainder or reverter, should be deemed in lawful seisin, estate and possession of the same hereditaments to all intents for the like estates as they had in use, trust or confidence in the same; and that the estate[7] of a person or persons seised of any land, tenements or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, should be deemed to be in him or them that had such use, confidence or trust in manner corresponding to the use, confidence or trust[8]. The statute did not affect persons who were seised to their own use[9].

1 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

2 The King, it was said, being displeased for the loss of wardships and other injuries done (although 4 Hen 7 c 17 (Wardship) (1488) (repealed) had attached the incidents of wardship and relief to uses of lands held by knight service) complained to the judges, who told him that if the possession might be joined to the use all would go well: *Brent's Case* (1583) 2 Leon 14 at 17 per Harper J. As to the intention of the Statute of Uses (1535) (repealed) see further its preamble; *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 124a.

3 Statute of Uses (1535) s 1 (repealed). See also William's Seisin of the Freehold 137 et seq; Leake's Law of Property in Land (2nd Edn) 81 et seq.

4 The omission here of 'body politic', and its inclusion subsequently, shows that a corporation could not be seised to a use, although it could take the benefit of a use. It is well settled, however, that it can be seised in trust: see Challis's Law of Real Property (3rd Edn) 388-389, CORPORATIONS vol 9(2) (2006 Reissue) PARA 1246.

5 The full words are 'honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments': see the Statute of Uses (1535) s 1 (repealed). Copyholds were not within the statute: Sanders on Uses and Trusts (5th Edn) 249; *Baker v White* (1875) LR 20 Eq 166. Nor were personal hereditaments: Gilbert's Law of Uses and Trusts (3rd Edn) 485. See also PARA 82 post. In a devise of freeholds and copyholds (*Baker v White* supra), or freeholds and chattels personal together (*Re Brooke, Brooke v Brooke* [1894] 1 Ch 43), the statute might apply to the freeholds only. As to the application of the statute to wills see note 6 infra; and PARA 23 note 2 post.

6 The full words are 'by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise': Statute of Uses (1535) s 1 (repealed). It is presumed that wills were included because a custom to devise existed in certain places, although the power of testamentary disposition was not general.

7 In full this read 'the estate right, title and possession': ibid s 1 (repealed).

8 Ibid s 1 (repealed).

9 Where persons were jointly seised to the use of any of themselves, the legal estate vested in the person or persons that had the use: ibid s 2 (repealed).

21. Conditions essential to the operation of the Statute of Uses.

In order that the Statute of Uses[1] might operate four conditions had to be satisfied:

5 (1) there had to be a person seised to a use or trust[2]. Consequently there had to be an estate of freehold[3] limited to the grantee to uses, and the statute did not apply where the grantee took only a term of years[4], even though the use might be limited for a term[5]. A grant of a vested remainder carried a sufficient seisin for uses declared of the remainder to be executed by the statute[6];

6 (2) there had to be a person for whose benefit the use was created and who was different from the grantee to uses. Thus, a conveyance made unto and to the use of the grantee and his heirs operated at common law, and not under the statute, to vest the legal estate in the grantee[7], but the express declaration of the use to the grantee prevented a further use being raised in favour of any other person[8]. Where the uses were split up into successive estates, and the use of one of them was declared in favour of the grantee to uses, the same rule generally applied, and the grantee took his use at the common law and not under the statute; thus where the grant was to one in fee to the use of himself for life or years, with remainders over in the use, the grantee took his estate for life or years at the common law, and the remainders were executed by the statute[9];

7 (3) there had to be a use, express or implied, actually created to take effect either immediately or in the future[10];

8 (4) the property of which the use was declared had to be actually the property of the person creating the use at that time; the use could not be created in property to be after-acquired[11].

1 Statute of Uses (1535) (repealed).

2 1 Sanders on Uses and Trusts (5th Edn) 85. As to the essential conditions for the existence of a use see PARA 17 ante.

3 Cf para 17 text and note 11 ante.

4 *Anon* (1580) 3 Dyer 369a; 1 Sanders on Uses and Trusts (5th Edn) 86, 275.

5 See *Heyward's Case* (1595) 2 Co Rep 35a; Gilbert's Law of Uses and Trusts (3rd Edn) 182.

6 1 Sanders on Uses and Trusts (5th Edn) 105; *Haggerston v Hanbury* (1826) 5 B & C 101.

7 *Sammes's Case* (1609) 13 Co Rep 54 at 56; *Gwam and Ward v Roe* (1706) 1 Salk 90; *Lord Altham v Earl of Anglesey* (1709) Gilb Ch 16 at 17; *Long v Buckeridge* (1718) 1 Stra 106; *Doe d Lloyd v Passingham* (1827) 6 B & C 305; *Webster v Ashton-under-Lyne Overseers, Orme's Case* (1872) LR 8 CP 281; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA; 1 Sanders on Uses and Trusts (5th Edn) 89, 163-164. In a fine, no use resulted on want of consideration, and the words 'and to the use of', were superfluous; and they were superfluous, too, in a feoffment made upon consideration. In a feoffment without consideration, they excluded a resulting trust. However, no trust now results merely by reason that the conveyance is voluntary: see the Law of Property Act 1925 s 60(3). The grantor might himself be the person for whose benefit the use was created, and conveyances to uses were resorted to in order to enable the grantor to take a new estate in the use as a purchaser. He might thus take a limited estate, for life, for years, or in tail, and his heirs in tail, if they alone were mentioned, might take the use by purchase, but not his heirs general. Under a limitation of the use of the heirs general of the grantor, he himself took as of his old estate (*Fennick v Mitford* (1589) 1 Leon 182; Co Litt 22b; 1 Sanders on Uses and Trusts (5th Edn) 136 et seq); but subsequently, under such a limitation he was entitled by purchase (see the Inheritance Act 1833 s 3 (amended by the Statute Law Revision (No 2) Act 1888)). See further PARA 164 post; and EXECUTORS AND ADMINISTRATORS.

8 Although the grantee took at common law, and the use was to that extent ineffective, yet the use had been in fact declared, and this prevented any further declaration of use which could take effect under the statute: *Tipping v Cosins* (1694) Comb 312; 1 Sanders on Uses and Trusts (5th Edn) 90. See also *Doe d Lloyd v Passingham* (1827) 6 B & C 305; *Cooper v Kynock* (1872) 7 Ch App 398. Moreover, the use thus declared could be displaced by a subsequent use limited as a shifting use: see Leake's Law of Property in Land (2nd Edn) 94, and authorities cited there.

9 *Sammes's Case* (1609) 13 Co Rep 54 at 56; *Doe d Hutchinson v Prestwidge* (1815) 4 M & S 178; *Webster v Ashton-under-Lyne Overseers, Orme's Case* (1872) LR 8 CP 281. However, the rule was departed from when special considerations of convenience or other circumstances required it; where, eg, the uses were carved out into many estates, and the grantee's own use was in the midst of them, such as an estate for life placed between other estates, or where the use in favour of the grantee was an estate tail. In these cases the use was executed by the statute; in the case of a life estate on grounds of convenience; in the case of an estate tail because the issue in tail were interested: see *Sammes's Case* supra at 56; 1 Sanders on Uses and Trusts (5th Edn) 92-93, where some other exceptions to the rule are mentioned. The exceptions have been based on the ground of 'a direct impossibility or impertinency for the use to take effect by the common law': Bacon's Reading upon the Statute of Uses 63. See also Challis's Law of Real Property (3rd Edn) 390.

10 1 Sanders on Uses and Trusts (5th Edn) 94.

11 1 Sanders on Uses and Trusts (5th Edn) 105.

22. Declarations of use exhausted the Statute of Uses.

The effect of the Statute of Uses[1] was exhausted by the first declaration of the use. The legal estate was executed in the person for whose benefit the use was created under that use, and any further limitation of the use was, at first, of no effect. Thus, a limitation to A and his heirs to the use of B and his heirs to the use of C and his heirs vested the legal fee simple in B for his own benefit, and A and C took nothing[2].

1 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

2 The further use to C is at law unexecuted: *Tyrrel's Case* (1557) 2 Dyer 155a; *Haggerston v Hanbury* (1826) 5 B & C 101; 2 Bl Com (14th Edn) 335; 1 Sanders on Uses and Trusts (5th Edn) 275; Gilbert's Law of Uses and Trusts (3rd Edn) 347 et seq. Thus it was possible for equity once again to intervene, and this construction of the statute was the occasion of the reintroduction of equitable uses under the name of trusts. See further PARA 25 post.

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23. Assurance under the Statute of Uses.

For the Statute of Uses[1] to operate there must be an assurance by which a use could be created. Such assurance might either transfer the seisin and raise a use upon the seisin in the transferee, in which case it was said to operate by way of transmutation of possession; or without disturbing the seisin in the assurer, it might raise the use upon this seisin; it was then said to operate without transmutation of possession[2].

An ordinary grant to A in fee simple to the use of B in fee simple was an assurance of the first kind[3]. The effect of the statute was that the legal estate in fee simple which would vest in A was destroyed[4], and the estate of B, which, apart from the statute, would be only an equitable estate, became the legal estate in fee simple, with all the incidents of the legal estate, including all benefits and advantages inherent in the estate, and the benefit of covenants running with the land[5]; and, generally, the person for whose benefit the use was created had the same estate at law as that limited to him in the use[6].

A bargain and sale[7], or a covenant to stand seised[8], both of which forms of assurance are obsolete, were assurances of the second kind. The seisin remained, but for the Statute of Uses, in the vendor or settlor, but upon this seisin a use was raised in favour of the purchaser or donee, and the statute joined the possession to this use and turned it into the legal estate[9].

1 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

2 1 Sanders on Uses and Trusts (5th Edn) 113 et seq. The Statute of Uses (1535) was passed before 32 Hen 8 c 1 (Wills) (1540), and 34 & 35 Hen 8 c 5 (Wills) (1542) (both repealed), and when, generally, land was not devisable at law. Consequently, perhaps, it did not operate directly on wills; but the use by a testator of expressions appropriate to a conveyance under the Statute of Uses (1535) (repealed) was an indication of his intention that the limitations should be construed as if the will were a conveyance, and effect would be given to this intention: 1 Sanders on Uses and Trusts (5th Edn) 245; Gilbert's Law of Uses and Trusts (3rd Edn) 356; Co Litt 272a, Butler's note 1, viii 1; Challis's Law of Real Property (3rd Edn) 387; *Baker v White* (1875) LR 20 Eq 166 at 170; *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465 at 478, CA.

3 Formerly the usual assurance operating by transmutation of possession was a feoffment with livery of seisin, and the transmutation of possession actually took place; under the modern grant, which took its place (see PARA 239 post), there was not necessarily any change of possession, and the description was not strictly applicable. As to other assurances, now obsolete, which formerly operated in the same way see Challis's Law of Real Property (3rd Edn) 391.

4 It was said that the grantee to uses retained the right to the custody of the title deeds (1 Sanders on Uses and Trusts (5th Edn) 118), but this right now goes with the legal estate: see PARA 87 note 3 post. However, when the legal owners were trustees, the court had power to give an equitable tenant for life the custody of the title deeds (*Re Burnaby's Settled Estates* (1889) 42 ChD 621; *Re Richardson, Richardson v Richardson* [1900] 2 Ch 778 at 784; *Re Money Kyrle's Settlement, Money Kyrle v Money Kyrle* [1900] 2 Ch 839; *Re Wilkinson, Lloyd v Steel* (1901) 85 LT 43); and now the tenant for life is entitled to the deeds as owner of the legal estate: see PARA 87 post; and SETTLEMENTS. As to the statutory restrictions on the creation of a strict settlement on or after 1 January 1997 see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 post.

5 1 Sanders on Uses and Trusts (5th Edn) 120.

6 See *Re Dudson's Contract* (1878) 8 ChD 628, CA. As to possession of a term under a limitation of the use of the term see *Webster v Ashton-under-Lyne Overseers, Hadfield's Case* (1873) LR 8 CP 306. The Statute of Uses (1535) (repealed) only operated, however, to the extent of the estate of the person who was seised to the uses; if this was the fee simple, uses could be declared which exhausted the fee simple; if it was less than the fee simple, the effective uses were restricted accordingly: 1 Sanders on Uses and Trusts (5th Edn) 107. When, upon a grant in fee simple, uses were declared of a particular estate with a vested remainder, the uses were at once executed by the statute, and the legal estate was finally divided between the particular estate and the remainder; but when a use in remainder was contingent, it could not be executed until the remainder vested, and it was originally a question whether any and what interest remained in the feoffees to uses to serve the remainder when it vested. The same question arose when a future interest was limited by way of executory use. To meet the difficulty it was said that, while the whole seisin was by the statute carried over from the feoffees to uses to the persons for whose benefit the use was created and who had vested estates, yet a possibility of seisin or a scintilla juris (ie a spark or shadow of right) remained in them, which was sufficient to give effect, when necessary, to contingent or executory uses. Other theories were that the seisin was in nubibus or in the custody of the law: see *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a; Fearne's Contingent Remainders 446; 1 Sanders on Uses and Trusts (5th Edn) 108 et seq; Gilbert's Law of Uses and Trusts (3rd Edn) 296n; Williams on the Law of Real Property (24th Edn) 452. It was, however, provided by statute that all such uses should take effect when and as they arose by force of, and by relation to, the seisin originally vested in the person seised to the uses; and the continued existence in him of any scintilla juris was not necessary: see the Law of Property (Amendment) Act 1860 s 7 (repealed).

7 A mere contract for value would have passed the legal estate under the Statute of Uses (1535) (repealed), but to prevent this the statutory requirement of an enrolled deed was introduced: see PARA 237 post. The enrolment related back so as to give the legal estate to the purchaser by virtue of the Statute of Uses (1535) (repealed) as from the time of execution: Gilbert's Law of Uses and Trusts (3rd Edn) 202, 209n.

8 Gilbert's Law of Uses and Trusts (3rd Edn) 242. See also *Re Sergie, Shribman v Hall* [1954] NI 1 at 25-29, NI CA, per Black LJ; and PARA 237 note 5 post.

9 1 Sanders on Uses and Trusts (5th Edn) 113; Challis's Law of Real Property (3rd Edn) 392.

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(iii) Position after the Statute of Uses

24. The creation of new legal estates.

At common law before the Statute of Uses[1] future interests could only be created inter vivos as remainders or reversions, and they had to comply with certain rules, notably that an estate of freehold could not be limited so as to commence in the future, save by way of remainder after a preceding estate, and that an estate in remainder must be so limited that it would not take effect until the regular determination of the preceding estate[2]. Future interests which did not comply with the common law rules could be created in equity by means of uses, known as springing and shifting uses[3]. The effect of the Statute of Uses[4] was to execute all such uses and to give those for whose benefit the use was created legal executory interests equivalent to the equitable interests which they would otherwise have had. In this way the variety of possible legal estates and the flexibility of legal conveyances was greatly increased[5].

1 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

2 As to the former rules for the creation of remainders see PARA 168 post.

3 As to executory interests generally see PARA 173 et seq post.

4 See the Statute of Uses (1535) s 1 (repealed); and PARA 20 ante.

5 This result has been referred to as 'that wonderful calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law': 2 Pollock and Maitland's History of English Law (2nd Edn) 11. The multiplicity of estates is now, however, confined to equitable interests, since legal estates can exist only in the fee simple or a term of years absolute: see the Law of Property Act 1925 s 1 (as amended); and PARAS 44-45 post.

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25. The introduction of trusts.

With the abolition of the special incidents of tenure by knight service[1], one of the principal objections to the separation of the seisin from the beneficial interest in the land disappeared[2]. Subsequently, the Court of Chancery began to enforce the use upon a use, which was not executed by the Statute of Uses[3], but was void at common law[4]. The uses thus enforced in equity were more generally known as trusts, to distinguish them from the uses which were executed by the statute[5]. Thus a limitation to A and his heirs to the use of B and his heirs in trust for C vested the legal fee simple in B in trust for C[6]. The beneficiary was recognised as having a direct right in the land itself, and in accordance with the rule that equity follows the law, the beneficiary might have equitable estates in fee, for life or in remainder, corresponding to the variety of estates which could exist at law[7].

1 See the Tenures Abolition Act 1660 (repealed, save for s 4); and PARA 10 ante.

2 As to the ending of the division between the legal and beneficial interest in land and the joining of the legal estate to the use see PARA 20 note 2 ante.

3 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

4 *Tyrrel's Case* (1557) 2 Dyer 155a. See also PARA 22 note 2 ante. The first reported case is said to be *Sambach v Dalston* (1635) Toth 188; but as to this case see 74 LQR 550; and see generally 1 Sanders on Uses and Trusts (5th Edn) 277 et seq; (1957) Cambridge Law Journal 72.

5 See *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 217 per Lord Mansfield CJ.

6 *Cooper v Kynock* (1872) 7 Ch App 398. The limitation was commonly shortened to 'unto and to the use of B and his heirs in trust for C', and this gave rise to the somewhat exaggerated criticism by Lord Hardwicke that the statute 'had no other effect than to add at most three words to a conveyance': *Hopkins v Hopkins* (1738) 1 Atk 581 at 591. See also Challis's Law of Real Property (3rd Edn) 387.

7 See 7 Holdsworth's History of English Law 76 et seq, 144 et seq.

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26. Assurances of land.

Before the Statute of Uses[1] corporeal hereditaments were conveyed by feoffment with livery of seisin, which required the presence of the parties or their attorneys on the land[2]. As a result of the statute new forms of assurance were devised which avoided this inconvenience, namely the bargain and sale and the lease and release[3], and during the seventeenth century the lease and release became the normal form of conveyance[4].

1 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

2 As to livery of seisin and feoffment see PARA 233 post.

3 As to bargain and sale and lease and release see PARAS 237-238 post.

4 7 Holdsworth's History of English Law 360.

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27. The equity of redemption.

Another source of equitable estates was the mortgage[1]. In the fifteenth century a mortgage of freehold land took the form of a conveyance to the mortgagee on condition that if the mortgagor repaid the loan on a certain day the conveyance should be defeated and the mortgagor might re-enter[2]. If he failed to pay on that day the conveyance was indefeasible, and moreover the debt remained payable[3]. However, the Court of Chancery regarded the conveyance as a mere security for repayment of the loan, and by the seventeenth century would compel the mortgagee to reconvey the land to the mortgagor on payment of the amount due with interest and costs, even if the day named for repayment was long past[4]. The rights of the mortgagor were known as the equity of redemption, and this was an equitable estate in the land[5].

1 As to mortgages generally see MORTGAGE vol 77 (2010) PARA 101 et seq.

2 Littleton's Tenures s 332; 3 Holdsworth's History of English Law 129.

3 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 35, HL.

4 5 Holdsworth's History of English Law 330.

5 *Casborne v Scarfe* (1738) 1 Atk 603. See also EQUITY vol 16(2) (Reissue) PARA 605. Since 1925 legal mortgages must be made by demise for a long term of years or by charge by way of legal mortgage. In either case the mortgagor now retains a legal estate in the land, coupled with the equity of redemption: see further MORTGAGE vol 77 (2010) PARA 302 et seq.

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(4) STATUTORY REFORMS OF THE NINETEENTH CENTURY

28. Simplification of conveyancing.

During the nineteenth century the substance of the law of real property remained largely unaltered[1], but a number of statutes were passed with the objects of simplifying conveyancing and extending the powers of limited owners. Assurances by bargain and sale or by lease and release were rendered obsolete by the Real Property Act 1845 and were replaced by a deed of grant[2]. The fictitious forms of action known as fines and recoveries were abolished by the Fines and Recoveries Act 1833 and replaced by a disentailing deed[3]. Conveyances to uses to bar dower were rendered unnecessary by the Dower Act 1833, which enabled a man to bar his wife's right to dower by deed or will[4]. Further simplifications were effected by the Satisfied Terms Act 1845[5] and the Conveyancing Acts 1881[6] and 1882[7].

1 The Real Property Commissioners reported in 1829 that the substance of the law, 'except in a few comparatively unimportant particulars, appears to come almost as near to perfection as can be expected in any human institutions': *First Report of Commissioners on the Law of Real Property* (1829) 6. For an example of a change in the basic law of real property see the Contingent Remainders Act 1877 (repealed); and PARA 171 post.

2 See the Real Property Act 1845 s 2 (repealed); and PARA 239 post.

3 See the Fines and Recoveries Act 1833 ss 2, 3 (repealed); and see generally para 121 et seq post.

4 The Dower Act 1833 was repealed by the Administration of Estates Act 1925 s 56, Sch 2 Pt I, in relation to deaths occurring after 1925. See also PARA 161 post.

5 The Satisfied Terms Act 1845 was repealed by the Law of Property Act 1925 s 207, Sch 7 (repealed). See also PARA 113 post.

6 As to the granting of an estate in fee simple see PARA 93 post. As to the enlargement of long terms see PARA 108 post.

7 The Conveyancing Act 1882 was repealed by the Law of Property Act 1925 s 207, Sch 7 (repealed). It put restrictions on the doctrine of constructive notice: see *Re Cousins* (1886) 31 ChD 671 at 677. It also put an end to the doctrine that where the same solicitor was acting for both parties to a sale or mortgage, the knowledge of the vendor or mortgagor, although not acquired in the transaction, was imputed to him and through him to his other client: see the Conveyancing Act 1882 s 3 (repealed; re-enacted with amendments in the Law of Property Act 1925 s 199); *Re Cousins* supra. *Boursot v Savage* (1866) LR 2 Eq 134, so far as it rested on this doctrine, is not now an authority: *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 at 259, CA. For a discussion of the situation where the knowledge is acquired in the same transaction see *Halifax Mortgage Services Ltd v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA.

29. Extension of the powers of limited owners.

In the early nineteenth century, unless the will or settlement under which he was entitled contained express powers, a tenant for life could deal only with his own life estate, and could neither sell nor exchange the settled land, nor raise capital money by mortgage, nor grant leases which would be binding on the remaindermen[1]. A series of statutes passed between 1840 and 1877 conferred on the tenant for life in possession power to raise money for the purpose of carrying out specified improvements, and to charge the loan on the land[2], and further statutes conferred power to grant leases of limited duration which would bind subsequent owners of the land[3], and enabled settled land to be exchanged by order of the Inclosure Commissioners[4]. The Settled Land Act 1882[5] effected a more general reform, and

conferred on the tenant for life wide powers of dealing with the land, including power to sell the fee simple, subject to provisions designed to protect the interests of all the beneficiaries under the settlement.

1 As to the general position of the tenant for life see further Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 70 et seq.

2 See eg the Settled Estates Drainage Act 1840 (repealed); the Land Drainage Act 1845 (repealed); the Improvement of Land Act 1864; the Limited Owners Residences Act 1870; the Limited Owners Residences Act (1870) Amendment Act 1871; and the Limited Owners Reservoirs and Water Supply Further Facilities Act 1877 (repealed). See further AGRICULTURAL LAND vol 1 (2008) PARA 613 et seq; and SETTLEMENTS.

3 The principal Acts were the Settled Estates Act 1856 and the Settled Estates Act 1877 (both repealed). See further SETTLEMENTS.

4 See the Inclosure Act 1845 s 147 (amended by the Statute Law Revision Act 1891). The power is now exercised by the Secretary of State for the Environment, Transport and the Regions as regards England and the Secretary of State for Wales as regards Wales: see PARA 242 post.

5 The Settled Land Act 1882 was repealed and replaced (except s 30) by the Settled Land Act 1925: see s 119(1), Sch 5 (repealed). As to the powers of a tenant for life now see SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no settlement is deemed to be made under the Settled Land Act 1925 on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 post.

UPDATE

29 Extension of the powers of limited owners

NOTE 4--Inclosure Act 1845 s 147 repealed: Commons Act 2006 s 48(1), Sch 6 Pt 3 (in force in relation to England: SI 2007/2584).

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30. Other reforms.

Other statutes passed during the nineteenth century facilitated the acquisition of easements and profits à prendre by prescription[1], and the extinction of title by adverse possession[2]. Substantial amendments were made by the Inheritance Act 1833 to the law of intestate succession to real property[3], and the Wills Act 1837 amended the law relating to both the form and the construction of wills[4]. The Land Transfer Act 1897 provided that the real estate of a deceased person should vest in his personal representatives instead of his heir-at-law[5]. The disabilities to which married women were subject at common law were lessened by the Married Women's Property Act 1870[6] and largely removed by the Married Women's Property Act 1882[7], while minors (referred to in the relevant legislation as 'infants') were enabled, with the sanction of the court, to make binding settlements of their property on marriage[8].

Voluntary enfranchisement of copyhold land was rendered easier by the Copyhold Acts 1841, 1843 and 1844[9]; and the Copyhold Acts 1852, 1858 and 1887[10], consolidated by the Copyhold Act 1894[11], enabled either the lord or the tenant to obtain compulsory enfranchisement.

The registration of title to land was first introduced by the Land Registry Act 1862[12]. The system of registration was revised by the Land Transfer Act 1875[13], and provision for compulsory registration of title in defined areas was contained in the Land Transfer Act 1897[14]. Registers

were also established in which pending actions, deeds of arrangement and other land charges might be registered[15].

1 See the Prescription Act 1832; and EASEMENTS AND PROFITS A PRENDRE.

2 See the Real Property Limitation Act 1833 (repealed) and the Real Property Limitation Act 1874 (repealed). The provisions of these repealed Acts were replaced by the Limitation Act 1939 which was in turn repealed and replaced by the Limitation Act 1980. See LIMITATION PERIODS vol 68 (2008) PARA 1025 et seq.

3 For the old rules relating to the descent of real property see EXECUTORS AND ADMINISTRATORS.

4 As to the form and construction of wills see WILLS vol 50 (2005 Reissue) PARAS 348 et seq, 512 et seq.

5 See the Land Transfer Act 1897 s 2(1) (repealed as respects deaths after 1925); and EXECUTORS AND ADMINISTRATORS. Similar provisions respecting trust and mortgage estates vested in a deceased person were contained in the Conveyancing Act 1881 s 30 (repealed except as to deaths before 1926): see EXECUTORS AND ADMINISTRATORS.

6 See the Married Women's Property Act 1870 s 8 (repealed).

7 See the Married Women's Property Act 1882 ss 2, 5 (repealed); para 230 post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

8 See the Infant Settlement Act 1855 (repealed); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 85.

9 The Copyhold Acts 1841, 1843 and 1844 were all repealed by the Copyhold Act 1894 s 100 (repealed: see note 11 infra).

10 The Copyhold Acts 1852, 1858 and 1887 were all repealed by the Copyhold Act 1894 s 100 (repealed: see note 11 infra).

11 The Copyhold Act 1894 was repealed by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt III. See also PARA 31 text and note 7 post. As to the general statutory enfranchisement see PARA 31 et seq post.

12 As to the Land Registry Act 1862 and the derivation of the present statute law generally see LAND REGISTRATION vol 26 (2004 Reissue) PARA 801.

13 The Land Transfer Act 1875 was repealed by the Land Registration Act 1925 ss 147, 148(2), Schedule. See also LAND REGISTRATION.

14 As to the Land Transfer Act 1897 (repealed) and registration of title generally see LAND REGISTRATION. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

15 As to the present system of registration of land charges see LAND CHARGES.

(5) COPYHOLD ENFRANCHISEMENT

(i) General Statutory Enfranchisement

31. Introduction.

Copyhold tenure[1] was abolished by the Law of Property Act 1922[2], which provided that, as from 1 January 1926[3], every parcel of copyhold land should be enfranchised and cease to be of copyhold tenure[4], and this provision applied also to customary freeholds[5]. With the extension of land registration[6] and the passage of time, it will now be rare that a title to land goes back to an enfranchisement under the 1922 Act[7]. Nevertheless it is still possible that a title can commence with a copyhold tenure prior to 1925, and accordingly the rules of enfranchisement[8] and vesting[9] may be of importance.

Notwithstanding the general enfranchisement, the laws concerning copyhold tenure are still of importance with regard to manors, manorial courts and court rolls[10] and manorial incidents excepted from abolition on enfranchisement[11].

1 'Copyholders are in truth no other but villeins who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will': Co Litt 58a. See further CUSTOM AND USAGE.

2 The Law of Property Act 1922, by which all copyhold land was enfranchised (see PARA 32 post), has now, on the recommendation of the Law Commission (*First Programme on Consolidation and Statute Law Revision* (Law Com no 2) 37), been almost entirely repealed as spent or inoperative: Statute Law (Repeals) Act 1969 s 1, Schedule Pt III. The only sections of the Law of Property Act 1922 remaining in force at the date at which this volume states the law were: s 137 (protection of royal parks); s 144 (power to inspect court rolls); s 144A (as added) (manorial documents); s 145 (conversion of perpetually renewable leaseholds); s 188 (part) (general definitions); s 190 (special definitions applicable to s 145); Sch 15 (provisions applicable to perpetually renewable leases and underleases). See further CUSTOM AND USAGE; and see also OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 565; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 541-542.

3 Ibid s 191(2) (repealed); Law of Property Act (Postponement) Act 1924 s 1 (repealed).

4 Law of Property Act 1922 s 128(1) (repealed).

5 Ibid s 189(a) (repealed); and see further PARAS 32-35 post.

6 The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

7 Prior to 1926 enfranchisement could be effected both at common law and under a number of statutes repealed and consolidated by the Copyhold Act 1894 (itself repealed by the Statute Law (Repeals) Act 1969): see PARA 30 ante. Deeds of enfranchisement so effected are not a good root of title: *R v Registrar of Deeds for the County of Middlesex* (1888) 21 QBD 555 at 560-561, CA.

8 See PARAS 32-35 post.

9 See PARAS 36-41 post.

10 See further CUSTOM AND USAGE.

11 See PARA 35 post.

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32. Statutory enfranchisement.

Copyhold tenure was abolished and all copyhold land enfranchised by the Law of Property Act 1922 as from 1 January 1926[1]. As from that date every parcel of copyhold land was, by virtue of

the Act, enfranchised and ceased to be of copyhold tenure[2]. Copyhold land, so enfranchised, included: (1) land commonly known as customary land, or customary freehold land, where the freehold was in the lord and not in the customary tenant; (2) land of copyhold tenure held for life or for lives or for years, whether or not determinable with life, where the tenant had by custom a perpetual right of renewal, subject or not to the fulfilment of any conditions; (3) land held in free tenure for life or lives or for years, whether or not determinable with life (but subject to custom), where the tenant had by a custom a perpetual right of renewal, subject or not to the fulfilment of any conditions[3].

1 Law of Property Act 1922 s 191(2); Law of Property Act (Postponement) Act 1924 s 1 (repealed). For giving effect to the Law of Property Act 1925, which came into operation on 1 January 1926 (s 209(2)), the enfranchisement of copyhold land, and the conversion into long terms of perpetually renewable leaseholds (see PARA 41 note 2 post) and of leases for lives and of leases for years terminable with life or lives or on marriage (see PARA 39 post) effected by the Law of Property Act 1922 is deemed to have been effected immediately before the commencement of the Law of Property Act 1925: see s 202. For an instance of the successive operation of the enfranchisement provisions of the Law of Property Act 1922 and the transitional provisions of the Law of Property Act 1925 see *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483, cited in PARA 37 note 3 post. As to the transitional provisions of the 1925 Act see PARA 49 et seq post.

2 Law of Property Act 1922 s 128(1) (repealed).

3 Law of Property Act 1922 s 189 (repealed). As to copyholds for lives see 1 Watkins on Copyholds (4th Edn) 71 note (1), 122 note (3); as to a custom to renew copyholds for lives see 1 Watkins on Copyholds (4th Edn) 62 note (1); and PARA 41 note 1 post; as to enfranchisement of such copyholds with perpetual right of renewal see PARA 41 post; and as to conversion into leaseholds where there was no such right see PARA 39 post.

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33. All land of socage tenure.

Modes of assurance authorised by special custom were abolished, and it was enacted that all land (including land held in free tenure but subject to custom) should be dealt with as land held in free and common socage discharged from custom[1]. Apart from this express provision, it seems that the mere enfranchisement would have extinguished all manorial customs and incidents, and changed the tenure into free and common socage[2]. All the customary suits and services and the liability to do fealty were abolished[3], but the services incident to grand and petty serjeanty were preserved[4]. Land affected by grand or petty serjeanty was made subject to the provisions of the Law of Property Act 1922 in like manner as if before the commencement of that Act it had been held in free and common socage or had been copyhold land as the case might require[5].

1 Law of Property Act 1922 s 128(3) (repealed).

2 See 1 Watkins on Copyholds (4th Edn) 450.

3 Law of Property Act 1922 s 128(2), Sch 12 para (1)(b) (repealed).

4 Ibid s 136 (repealed).

5 Ibid s 136 (repealed). As to the nature of tenure in serjeanty see PARA 5 ante.

(ii) Effect of General Enfranchisement

34. Effect of statutory enfranchisement.

The effect of the statutory enfranchisement was as follows[1]:

9 (1) the copyhold land became freehold land and was free from forfeiture for conveyance or attempted conveyance of an estate of freehold or alienation without licence, whether by way of sale, lease, mortgage or otherwise[2];

10 (2) the tenant[3] was free from the customary suits and services[4] and from liability to fealty[5];

11 (3) the right of the Crown or the Duchy of Lancaster or the Duke of Cornwall to bona vacantia was substituted for the lord's right to escheat[6];

12 (4) borough english, gavelkind, and other customary modes of descent, and dower, freebench, tenancy by the curtesy and all other customs were abolished, with a saving for dower or freebench and for curtesy where the husband or wife died before 1 January 1926[7]; and enfranchised copyholds were made subject to the general statutory provisions governing the administration of estates and succession on intestacy[8];

13 (5) the land was to be held under the same title as before the enfranchisement and was not to be subject to any estate or interest affecting the manor[9];

14 (6) mortgages of the copyhold land, whether effected by surrender, with or without admittance, or by a covenant to surrender, were converted into mortgages for a term of 3,000 years[10];

15 (7) where the copyhold land was subject to a lease, or became so subject by virtue of the Law of Property Act 1922[11], the freehold into which the copyhold estate was converted became the reversion immediately expectant on the lease[12].

1 Law of Property Act 1922 s 128(2), Sch 12. These provisions are now repealed; see PARA 31 ante. The effect of the enfranchisement was subject to the manorial incidents which were saved until subsequently extinguished: see ss 128(2), 138 (both repealed); and CUSTOM AND USAGE.

2 Ibid Sch 12 para (1)(a) (repealed). These forfeitures were inconsistent with the freehold tenure and free alienation of the enfranchised land and were excepted from the temporary saving of other forfeitures by s 128(2) proviso (c) (repealed).

3 Ie the person in whom the enfranchised land was vested including any person deriving title under him: ibid s 189 (repealed).

4 'Customary suits and services' probably refer to attendance at the customary or copyhold court: see further CUSTOM AND USAGE. As to the preservation of services incidental to grand and petty serjeanty see PARA 33 ante.

5 Law of Property Act 1922 Sch 12 para (1)(b) (repealed).

6 Ibid Sch 12 para (1)(c) (repealed). For the right of the Crown, or Duchy of Lancaster, or Duke of Cornwall to bona vacantia in lieu of any right to escheat see the Administration of Estates Act 1925 s 46(1)(vi). This provision replaces the corresponding provision of the Law of Property Act 1922 Pt VIII (repealed) mentioned in Sch 12 para (1)(c) (repealed). Land escheated to the lord where a tenant died intestate without leaving an heir: Co Litt 13a.

7 Law of Property Act 1922 Sch 12 para (1)(d) (repealed). The saving for freebench applied also where the right had attached before 1 January 1926 and could not be barred by a testamentary or other disposition made

by the husband. The right then, unless released, remained in force in equity: Sch 12 para (1)(d) proviso (repealed). The abolition of customary modes of descent and of dower, freebench and curtesy is repeated in the Administration of Estates Act 1925 s 45. The effect of the abolition of customary modes of descent is that in cases where descent of a beneficial interest to the heir of a deceased person is still possible, eg in the case of an entailed interest (see note 8 infra), descent will be to the common law heir and not to the customary heir: *Re Price* [1928] Ch 579 at 594-595; as to this case see further PARA 35 note 2 post.

8 Law of Property Act 1922 Sch 12 para (1)(d) (repealed). Parts VIII and IX of that Act, mentioned in Sch 12 para (1)(d), are repealed and have been replaced by the Administration of Estates Act 1925; and the devolution and distribution of property on intestacy is now regulated by s 46 (amended by the Intestates' Estates Act 1952 s 1; the Family Provision Act 1966 s 1; the Administration of Justice Act 1977 s 28(1); the Statute Law (Repeals) Act 1981; and the Law Reform (Succession) Act 1995 ss 1(1), (3), 5, Schedule). The Administration of Estates Act 1925 ss 45, 46 (as amended) do not, however, apply on the death intestate of a person of unsound mind or a defective who was of full age on 1 January 1926 and has not since recovered testamentary capacity; nor do they affect the descent or devolution of an entailed interest; in such cases the pre-1926 rules applicable to the devolution of freehold land apply: see s 45(2); s 51(1), (2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), Sch 8; and by virtue of the Mental Health Act 1983 s 148, Sch 5 para 29); the Law of Property Act 1925 s 130(4); para 141 post; and EXECUTORS AND ADMINISTRATORS.

9 Law of Property Act 1922 Sch 12 para (1)(e) (repealed). This provision was expressed to be subject to the changes made by Pt I (repealed; partly replaced by the Law of Property Act 1925 Pt I (ss 1-39) (as amended)), relating to the holding of legal estates. But the changes were primarily changes of form, and did not affect beneficial interests. The provision appeared to be intended to preclude the possibility that the copyholder's estate had merged in the lord's freehold, and had become subject to the limitations affecting the freehold.

10 Law of Property Act 1922 Sch 12 para (1)(f)(i) (repealed). This conversion was in accordance with the scheme of mortgages by demise introduced by the Law of Property Act 1925 s 39 (as amended), ss 85, 86, Sch 1 Pts VII, VIII (replacing the Law of Property Act 1922 s 9, Sch 2 (repealed)). A mortgagee obtained a complete legal title only by surrender and admittance; but even where there was only a covenant to surrender this usually contained a power of attorney to make the surrender, and for the purpose of the statutory conversion into a mortgage term, it is treated as a legal mortgage. But under the former law, where there was a covenant to surrender with A, giving him only an equitable security, followed by a surrender to B without notice of A's security, B had priority, for he had a legal title and an equal equity (*Oxwith v Plummer* (1708) Bac Abr, Mortgage, E3), and this priority was preserved by the Law of Property Act 1922 Sch 12 para (1)(f)(ii) (repealed), which provided that, in such a case, B was not to be deemed to be a subsequent incumbrancer as regards A's mortgage.

In Sch 12 para (1) (repealed), 'surrender' included any other disposition which, when entered on the court rolls, operated as a surrender to the use of any person. This was so in the case of a conveyance of copyhold land by a tenant for life under the Settled Land Act 1882 s 20 (repealed), and it operated as a surrender to the use of the purchaser.

11 Ie where a copyhold estate for lives was converted into a 90 years' term terminable by notice: see PARA 39 post.

12 Law of Property Act 1922 Sch 12 para (3) (repealed). Accordingly the benefit of the rents and the conditions was annexed to the reversion, and the burden of the lessor's and lessee's covenants was made to run with the reversion and the land respectively: Sch 12 para (3) (repealed). In manors in which it was the practice for copyholders in fee to grant derivative interests to persons who were admitted as copyholders in respect of those interests, the above provisions applied only in respect of leases taking effect out of the estate of the copyholder in fee: Sch 12 para (3) proviso (repealed). As to such manors see PARA 37 note 4 post.

35. Rights and liabilities preserved.

The following rights were preserved at the time of the general enfranchisement[1]:

16 (1) the enfranchisement did not affect the rights or interests of any person in the enfranchised land under a will, settlement, mortgage, or otherwise by purchase;

but those rights and interests attached on the enfranchised land as nearly as might be as if the freehold had been comprised in the disposition[2];

17 (2) the enfranchisement did not deprive the tenant of any commonable rights, but these, if existing in respect of the copyhold land, continue to attach to the land notwithstanding that the land became freehold[3];

18 (3) the enfranchisement did not affect the lord's or tenant's rights to mines, minerals, limestone, lime, clay, stone, gravel, pits or quarries, whether in or under the enfranchised land or not, or rights of working the same[4];

19 (4) the enfranchisement did not affect the rights, franchises, royalties or privileges of the lord in respect of fairs, markets, rights of chase or warren, piscaries, or other rights of hunting, shooting, fishing, fowling, or otherwise taking game, fish, or fowl[5];

20 (5) the enfranchisement did not affect any liability subsisting on 1 January 1926 (whether arising by virtue of a court leet regulation or otherwise) for the construction, maintenance, cleansing, or repair of dykes, ditches, canals, sea or river walls, piles, bridges, levels, ways and other works for the protection or general benefit of land within a manor, or for abating nuisances therein[6]. Any person interested in enforcing the liability could apply to the court[7] to ascertain or apportion the liability, and charge the same on the land or any interest therein; and in addition, the jurisdiction of any court leet, customary, or other court in reference to the matter was transferred to the court[8].

The rights thus preserved to the lord were not 'manorial incidents', so as to be liable to extinguishment as such[9], but the lord and tenant might include them in a compensation agreement if so desired and so extinguish them[10].

1 See PARA 31 ante. As to rights temporarily saved but now extinguished see the Law of Property Act 1922 ss 128(2), 138 (both repealed); and CUSTOM AND USAGE.

2 Ibid Sch 12 para (2). Schedule 12 is now repealed: see PARA 31 ante. Schedule 12 para (2) (repealed) contained the words 'except as in this Act mentioned'. These words were a saving for the changes effected by repealed provisions of the Law of Property Act 1922 with regard to the subsistence, vesting and devolution of legal estates, and as to the overreaching of equitable interests by virtue of a trust for sale or a settlement. These changes are now re-enacted in the Law of Property Act 1925 and the Settled Land Act 1925; see PARA 43 et seq post; and SETTLEMENTS. Thus a former legal interest in an undivided share of copyhold land became, by virtue of the Law of Property Act 1925 s 39, Sch 1 Pt IV (as originally enacted), an interest in a share of the proceeds of sale under the statutory trusts imposed on land held in undivided shares (now an interest behind a trust of land: Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5(1), Sch 2 para 7). In *Re Price* [1928] Ch 579, it was held that the conversion of an entailed interest in an undivided share of copyhold land into personalty barred the entail and made the interest absolute. The case was overruled by the Law of Property (Entailed Interests) Act 1932 s 1(1), amending the Law of Property Act 1925 s 35 (now repealed).

In the case of manors where the practice prevailed of granting derivative interests to persons who were admitted in respect of those interests, the provisions of the Law of Property Act 1922 Sch 12 para (2) (repealed) as to the attachment of rights under wills and other dispositions applied only to the estate of the copyholder in fee, and protection was given to the persons entitled to derivative interests by a subsequent provision (Sch 12 para (2) proviso (repealed)); for the subsequent provision see Sch 12 para (8)(c) (repealed) cited at para 37 note 4 post.

3 Ibid Sch 12 para (4) (repealed). There is the same saving in the Copyhold Act 1894 s 22 (repealed).

4 Law of Property Act 1922 Sch 12 para (5) (repealed). The enfranchisement did not affect any right of entry, right of way and search, or other easement or privilege of the lord or tenant in, on, through, over or under any land, or any powers which in respect of property in the soil might but for the enfranchisement have been exercised for the purpose of enabling the lord or tenant, their or his agents, workmen, or assigns, more effectively to search for, win and work any mines, minerals, pits or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel or other substances had or gotten therefrom: Sch 12 para (5) (repealed). Without prejudice to the rights to any mines or minerals or the right to work or carry away the same, the owner of the enfranchised land has full power to disturb or remove the soil so far as is necessary or convenient for the purpose of making roads or drains or erecting buildings or obtaining water on the land: see Sch 12 para (5) proviso (repealed).

There was the like saving in the Copyhold Act 1894 s 23 (repealed). As to the rights of lords and tenants before enfranchisement in respect of mines and minerals see CUSTOM AND USAGE. For the power of the tenant to grant rights of way or other easements for the winning of mines and minerals by way of compensation for the extinguishment of manorial incidents see the Law of Property Act 1922 s 138(12) (repealed). 'Mines and minerals' include any strata or seam of minerals or substances in or under any land and powers of working and getting the same but not an undivided share thereof: s 188(1); and see MINES, MINERALS AND QUARRIES. Interests in coal or coal mines in or under land formerly copyhold which were preserved to the tenant on enfranchisement were excluded from the assets which vested in the former National Coal Board upon the nationalisation of the coal industry, except in a case where the tenant had, by custom or otherwise (other than by virtue of a coal mining lease), the right to work coal without licence of the lord: see the Coal Act 1938 ss 3(1), 5(6) (repealed); the Coal Industry Nationalisation Act 1946 s 5, Sch 1 Pt I para 1(1) (repealed). On 31 October 1994, the ownership of coal reserves formerly vested in the National Coal Board (then called the British Coal Corporation) transferred to the Coal Authority: see the Coal Industry Act 1994 s 7; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 2-3. As to rights to work coal in former copyhold land see ss 49, 50; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 400 et seq.

5 Law of Property Act 1922 Sch 12 para (5) (repealed). As to franchises and sporting rights see further CUSTOM AND USAGE.

6 Ibid Sch 12 para (6) (repealed).

7 The 'court' means the High Court of Justice or the county court. In the High Court the jurisdiction was assigned to the Chancery Division. Applications to the court were by summons in chambers. The court could make such order as it thought fit respecting the costs, charges and expenses of all or any of the parties to any application: see ibid s 188(6) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). The county court had jurisdiction where the land to be dealt with did not exceed in capital value £500 or in rateable value £30: County Courts Act 1959 s 52(3), Sch 1 (repealed). The charge when made by the order was a land charge within the Land Charges Act 1925 (replacing the Land Charges Registration and Searches Act 1888), and might be registered accordingly under the Land Charges Act 1925 s 10(1), Class A (vi) (repealed and not replaced by the Land Charges Act 1972): see the Law of Property Act 1922, Sch 12 para (6) (repealed).

8 Ibid Sch 12 para (6) (repealed). As to courts leet and customary courts see further CUSTOM AND USAGE.

9 Ibid Sch 12 para (7) (repealed).

10 Ibid s 138(12), Sch 12 para (7) (repealed).

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(iii) Vesting of Freeholds

36. The vesting and transitional provisions.

Under the Law of Property Act 1925, the only freehold estate which is capable of subsisting at law is an estate in fee simple absolute in possession[1], and on the enfranchisement of copyhold land, in which immediately before 1 January 1926 a variety of interests, legal and equitable, might exist, it was necessary to determine in whom the legal estate in fee simple should vest. This was governed in the first instance by the vesting provisions of the Law of Property Act 1922[2].

The statutory enfranchisement was deemed to have had effect immediately before the coming into operation of the Law of Property Act 1925[3]; and accordingly, when considering in whom a legal estate ultimately vested on 1 January 1926 it may be necessary to have regard also to the transitional provisions of that Act[4], and of the Settled Land Act 1925[5].

1 See the Law of Property Act 1925 s 1(1)(a); and PARA 45 post.

2 See the Law of Property Act 1922 s 128(2), Sch 12 para (8). These provisions are now repealed; see PARA 31 ante. See also PARA 32 note 1 ante.

3 Law of Property Act 1925 s 202; *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483; and see PARA 32 note 1 ante.

4 See the Law of Property Act 1925 s 39 (as amended); and Sch 1 Pt II, particularly paras 2-5 (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). An example of the working out of the vesting and transitional provisions is afforded by *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483, cited in PARA 37 note 3 post.

5 See the Settled Land Act 1925 s 37, Sch 2. See also note 4 supra.

37. Rules for vesting.

The following rules governed the initial vesting of the legal estate:

21 (1) if there was a tenant in customary fee simple on the rolls, who was not a mortgagee, the legal estate vested in him, subject to certain special provisions[1];

22 (2) if there was no such tenant on the rolls, the legal estate vested in the person who immediately before 1 January 1926 had the best right to be admitted in fee otherwise than as mortgagee[2]; and if the last tenant was a trustee who had died before 1 January 1926, his personal representative was deemed to have had a better right to be admitted than the devisee or customary heir; accordingly, the legal estate vested in that personal representative[3];

23 (3) in the case of manors in which it was the practice of copyholders in fee to grant derivative interests to persons who were admitted in respect of those interests, the vesting under these rules inured for the benefit of the persons having or entitled to acquire any customary estate or interest[4];

24 (4) if the copyhold land was subject to interests affecting or derived out of the fee simple which under the new system were capable of subsisting at law[5], but were not liable to be overreached under a subsisting trust for sale or settlement[6], the persons entitled took legal estates[7] corresponding to their former equitable or other interests[8];

25 (5) if there was a person entitled to a perpetually renewable lease, he was treated as a copyholder in fee, and the legal estate vested in him[9];

26 (6) if the tenant on the rolls was a mortgagee, the legal estate vested in the person entitled to the equity of redemption[10];

27 (7) if the copyholder in fee or other person entitled to an interest corresponding to a legal estate was a trustee for a corporation or other person absolutely and beneficially entitled, the legal estate vested in that corporation or other person[11];

28 (8) if a person had under the Limitation Acts[12] acquired a customary estate corresponding to a legal estate, then a legal estate corresponding to the customary estate so acquired vested in him[13].

1 Law of Property Act 1922 Sch 12 para (8)(a). Schedule 12 is now repealed: see PARA 31 ante. The expression 'copyholder in fee', which is used in this paragraph, meant the person who was admitted in respect of the inheritance: s 189 (repealed). For the special provisions see PARA 38 post.

2 Ibid Sch 12 para (8)(b); Law of Property (Amendment) Act 1924 s 2, Sch 2 para 4(1) (all repealed). The person having the best right to be admitted would usually be the devisee or customary heir of the last tenant.

He was liable to pay the fines and fees payable on admittance: Law of Property Act 1922 Sch 12 para (8)(b) (repealed).

3 Ibid Sch 12 para (8)(b); Law of Property (Amendment) Act 1924 s 2, Sch 2 para 4(1) (all repealed). Copyhold lands held on trust formerly devolved on the death of the trustee on the customary heir: see *Re Hudson, Cassels v Hudson* [1908] 1 Ch 655. By the Administration of Estates Act 1925 ss 1, 3 (as amended) real estate held by a trustee devolves on his personal representatives; and see the Trustee Act 1925 s 18(2); and TRUSTS vol 48 (2007 Reissue) PARA 981. The above provision in effect made the devolution retrospective as regards former copyhold land. Where, however, the last tenant before 1926 was a deceased trustee who had immediately before 1 January 1926 no surviving personal representative, the legal estate vested in the first instance in his customary heir: *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483 at 492. Where, under the above provision, the legal estate vested in the first instance in the personal representative of a deceased trustee or in his customary heir, but, immediately before 1 January 1926, the equitable title to the land was vested in joint tenants subject only to an equitable rentcharge, the rentcharge vested (either under the Law of Property Act 1922 Sch 12 para (8)(d) (repealed) (see the text and note 8 infra), or under the Law of Property Act 1925 Sch 1 Pt II paras 4, 6(d) (as originally enacted)), as a legal rentcharge in the rentcharge owner; on the rentcharge becoming a legal rentcharge, the personal representative or customary heir became a bare trustee, and under Sch 1 Pt II para 3 (as amended), PARA 6(d) (see note 11 infra), the initial vesting in the heir was divested and the legal estate became vested subject to the rentcharge in the joint tenants: *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* supra.

4 Law of Property Act 1922 Sch 12 para (8)(c) (repealed). This practice prevailed in the manors within the Honour of Clitheroe in Lancashire. Schedule 12 para (8)(c) (repealed) provided that the person having or being entitled to acquire any customary estate or interest should, on the enfranchisement, become entitled to a legal estate (if his interest was capable of subsisting as such: see note 5 infra), or equitable interest corresponding to his former customary or other estate or interest, but subject to the manorial incidents until extinguished, and so that a mortgagee of the inheritance took only a term of years absolute; as to mortgagees see further PARA 34 ante.

5 See the Law of Property Act 1925 s 1(1), (2) (as amended) (replacing the Law of Property Act 1922 s 1(1)); and PARA 45 post.

6 See the Law of Property Act 1925 s 2 (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule); the Settled Land Act 1925 s 72; para 249 post; and SETTLEMENTS. As to the replacement of the statutory trusts for sale by trusts of land see PARA 66 post.

7 'Legal estates' mean the estates, interests or charges in or over land which are authorised to subsist or be created at law: see the Law of Property Act 1922 s 118(13) (repealed); the Law of Property Act 1925 s 205(1)(x). See also note 3 supra.

8 Law of Property Act 1922 Sch 12 para (8)(d) (repealed). A perpetual rentcharge vested either under that provision or under the Law of Property Act 1925 Sch 1 Pt II paras 4, 6(d) (as originally enacted): *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483 at 495; see note 3 supra.

9 Law of Property Act 1922 Sch 12 para (8)(e) (repealed). This gave effect to s 135 (repealed), cited at para 41 text and note 2 post.

10 Ibid Sch 12 para (8)(f) (Sch 12 para 8 (f)-(h) added by the Law of Property (Amendment) Act 1924 s 2, Sch 2 para 4(2); and now repealed). The Law of Property Act 1922 Sch 12 para (8)(f) was a consequence of Sch 12 para (1)(f) (repealed) (see PARA 34 text and note 10 ante), under which a mortgage became a mortgage by demise. This left the freehold outstanding and it vested in the mortgagor. Cf the Law of Property Act 1925 Sch 1 Pt VII para 3 (as amended); and MORTGAGE vol 77 (2010) PARA 101 et seq.

11 Law of Property Act 1922 Sch 12 para (8)(g) (repealed); and see note 3 supra. This corresponded to the Law of Property Act 1925 Sch 1 Pt II para 3 (as amended) (see note 3 supra) under which estates held by a trustee for a person absolutely entitled vested automatically in such person, but provision was made for the protection of a purchaser from such a trustee. Corporations were specially mentioned because a corporation aggregate could not hold copyhold land (see 1 Watkins on Copyholds (4th Edn) 37, 299-301), and hence the land had to be put in the name of a trustee: see *Ranshaw and Robottom's Case* (1601) Duke, ed Bridgman 135.

12 Ie the Real Property Limitation Act 1833; the Real Property Limitation Act 1837; and the Real Property Limitation Act 1874: see the Law of Property Act 1922 s 188(11) (repealed). Those Limitation Acts were repealed and replaced by the Limitation Act 1939 (itself now repealed and replaced by the Limitation Act 1980). See generally LIMITATION PERIODS.

13 Law of Property Act 1922 Sch 12 para (8)(h) (repealed); and see note 10 supra. It seems that the effect of this paragraph was to vest a legal estate in the enfranchised copyholds in any person who had before 1926 extinguished by adverse possession for the statutory period the title of the former owner of the corresponding customary estate and thereby himself acquired an unimpeachable possessory title; see the Real Property Limitation Act 1833 s 34 (repealed and replaced by the Limitation Act 1939 s 16 (repealed)). The wording of the sub-paragraph now under consideration is, however, somewhat inartistic, since the operation of the Real Property Limitation Act 1833 s 34 (repealed) was merely negative. It did not transfer to the person in possession the estate of the former owner or (in the case of copyholds) confer on him a 'customary estate'. It merely extinguished the right and title of the former owner (*Tichborne v Weir* (1892) 67 LT 735, CA; *Taylor v Twinberrow* [1930] 2 KB 16 at 28), and left the person who had taken possession with a title based on possession, which rested on the inability of others to eject him and which might in certain circumstances be forced on a purchaser (*Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 at 11, 19, CA); see further LIMITATION PERIODS vol 68 (2008) PARA 1095 et seq.

38. Provisos to vesting rules.

The rules for vesting[1] were subject to the following provisions:

29 (1) if a question arose as to who had the best right to be admitted as tenant in respect of the fee, or had otherwise become entitled to the legal estate of freehold or to a derivative legal estate, the court could determine the question on the application of the lord or any person interested in the land[2];

30 (2) if on 1 January 1926 the land was or became settled land, the fee simple or derivative legal estate vested in the tenant for life or statutory owner (including a personal representative entitled to the settled land) upon the trusts and subject to the powers and provisions necessary to give effect to the settlement[3];

31 (3) if the copyhold land, or an equitable interest therein capable of subsisting as a legal estate, was vested in a minor, the fee simple or derivative legal estate vested in the personal representatives, or trustees of the settlement, or other persons entitled to hold the legal estate of the minor[4];

32 (4) if the copyhold land was held in undivided shares, the entirety of the fee simple (subject to any terms of years absolute required for giving effect to mortgages affecting the entirety) vested in trustees for sale as was formerly the position in other cases of undivided shares in land[5];

33 (5) if on 1 January 1926 the copyhold land was, or was made, subject to[6] a trust for sale, the legal estate in fee simple vested in the trustees for sale[7].

Further provisions, which are no longer of importance, were made as to the payment of fines and fees where enfranchised copyholds vested in accordance with the rules previously set out[8].

1 Ie the rules set out in PARA 37 ante.

2 Law of Property Act 1922 Sch 12 para (8) proviso (i). Schedule 12 is now repealed: see PARA 31 ante. The court might make an order for the vesting of the fee simple or the derivative legal estate (subject to the reservation of any terms of years absolute required for giving effect to incumbrances) in such person as might be appointed by the court for the purpose, and in the case of the fee simple the person in whom the estate was vested was deemed to have been admitted, but fines and fees had to be paid or provided for as a condition of making the order: Sch 12 para (8) proviso (i) (repealed). The lord of the manor might be the person appointed and in such a case he was to be deemed to have paid the fines and fees: Sch 12 para (8) proviso (i) (repealed). A vesting order could also be made under this proviso where the person who had the best right to be admitted or who had become entitled could not be found or ascertained: Sch 12 para (8) proviso (i) (repealed). For the meaning of 'court' see PARA 35 note 7 ante. As to manors see generally CUSTOM AND USAGE.

3 Ibid Sch 12 para (8) proviso (ii) (repealed). The vesting was subject to the terms of years absolute of mortgagees having priority to the settlement and without prejudice in equity to any incumbrance affecting any life estate or interest: Sch 12 para (8) proviso (ii) (repealed). A fee simple conditional (whether legal or equitable) on the birth of issue was converted into an equitable entailed interest (either general or special as the case might require) if the fee had not become absolute: Sch 12 para (8) proviso (ii) (repealed). The vesting directed by this proviso is in accordance with the Law of Property Act 1925 Sch 1 Pt II paras 3, 5, 6(c) (as amended). The classes of settled land were widely extended by the Settled Land Act 1925: see s 1(1) (as amended), and particularly class (v), under which land which is subject to a family charge is settled land. See SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made thereafter: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 post.

4 Law of Property Act 1922 Sch 12 para (8) proviso (iii) (repealed). The vesting was subject to the rights of mortgagees: Sch 12 para (8) provisos (ii), (iii) (repealed). This provision is required because a minor cannot now hold a legal estate (Law of Property Act 1925 s 1(6)); and see the provisions relating to minors' land in Sch 1 Pt III (as amended) (replacing the Law of Property Act 1922 Sch 6); the Settled Land Act 1925 ss 1(1)(ii)(d), (2), (3), 26, Sch 2 para 3; and SETTLEMENTS.

5 Law of Property Act 1922 Sch 12 para (8) proviso (iv) (repealed). The entirety vested in trustees who held the land on the statutory trusts, including a trust for sale (but see now note 6 infra): Law of Property Act 1925 s 35, Sch 1 Pt IV (as originally enacted and amended by the Law of Property (Amendment) Act 1926 s 7, Schedule), replacing the Law of Property Act 1922 s 10, Sch 3 (repealed). As to the case where immediately before 1 January 1926 two or more persons were entitled in undivided shares as tenants for life under a settlement see the Law of Property Act 1925 Sch 1 Pt IV para 4 (added by the Law of Property (Amendment) Act 1926 s 7, Schedule); it would appear that in that case the Law of Property Act 1922 Sch 12 para (8) proviso (ii) (repealed), and not Sch 12 para (8) proviso (iv) (repealed), would apply. But the Law of Property Act 1925 Sch 1 Pt IV para 4 (as so added) is of very limited application; see *Re Higgs' and May's Contract* [1927] 2 Ch 249; *Re Robins, Holland v Gillam* [1928] Ch 721; *Re Barrat, Body v Barrat* [1929] 1 Ch 336.

6 Ie by virtue of the Law of Property Act 1925, and its associated Acts, which replaced corresponding provisions contained in the Law of Property Act 1922, referred to in Sch 12 para (8) proviso (v) (repealed). As from 1 January 1997, where at that date any land was held on trust for sale, or on the statutory trusts, by virtue of the Law of Property Act 1925 Sch 1 (as amended), it is on or after that date held in trust for the persons interested in the land: Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 7.

7 Law of Property Act 1922 Sch 12 para (8) proviso (v) (repealed). This is in accordance with the transitional vesting provision for land held on trust for sale in the Law of Property Act 1925 Sch 1 Pt II para 6(b). See also note 6 supra.

8 Law of Property Act 1922 Sch 12 para (8) provisos (vi)-(ix) (repealed).

(iv) Copyholds for Lives or Years

39. Where no right of perpetual renewal.

Copyholds for lives or years were dealt with by special provisions: first, for the case where there was no right of perpetual renewal; and secondly, for the case where there was such a right[1].

Copyhold lands held for life, or lives, or for years[2], where the tenant had no right of perpetual renewal were in the first instance converted into corresponding leasehold interests[3]. If the term for which the copyhold land was held was a term of years certain, no further change was made and the interest of the tenant took effect as a corresponding term of years absolute[4]. But if the interest was for life or lives, or determinable on the cesser of a life, then a further conversion was made and the lease became a lease for a term of 90 years determinable after the falling of a life, or of the last survivor of the lives, by at least one month's notice in writing expiring on

one of the quarter days of the tenancy[5]. This notice can be served either by the lessor or the persons deriving title under him, or by the lessee or other persons in whom the leasehold interest is vested[6].

The conversion of copyholds for lives into leaseholds for lives was deemed to have been effected immediately before the commencement of the Law of Property Act 1925, so that the further conversion into a 90 years' term determinable by notice followed instantaneously the conversion from copyhold to leasehold[7].

1 Law of Property Act 1922 ss 133, 135. These provisions are now repealed: see PARA 31 ante. For the position where there was a right of perpetual renewal see PARA 41 post.

2 Ibid s 133(1) (repealed). The subsequent words of this subsection show that holding 'for years determinable on the dropping of a life' is intended to be included, apparently as a form of holding for years.

3 Ibid s 133(1) (repealed). The provisions of ss 128-132 (repealed) relating to the enfranchisement did not apply to such copyholds: s 133(1) (repealed). As to copyholds for lives see PARA 41 note 1 post.

4 Ibid s 133(1) (repealed).

5 Ibid s 133(3) (repealed); Law of Property Act 1925 s 149(6) (replacing corresponding provisions contained in the Law of Property Act 1922 Pt VII).

6 Law of Property Act 1925 s 149(6); and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

7 Ibid s 202; and see PARA 32 note 1 ante.

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40. Effect of conversion of copyholds into leaseholds.

On the conversion of a copyhold for life or years into a leasehold[1], the lord's estate became the freehold reversion expectant on the leasehold interest thus created. The benefit of rents, services and conditions subject to which the copyhold interest was held was kept on foot and was incident and annexed to the reversion; the burden of the covenants or agreements expressed or implied on the part of the lord and the tenant respectively ran with the reversion and the land respectively; and the lord had the benefit of a proviso for re-entry after 30 days' default in payment of rent, or on non-performance or breach of services, covenants or conditions on the part of the tenant, subject to relief from forfeiture as in the case of ordinary leases[2].

1 See PARA 39 ante.

2 Law of Property Act 1922 s 133(1) (repealed). As to relief from forfeiture see the Law of Property Act 1925 s 146 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619.

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41. With right of perpetual renewal.

Where copyhold land was at the end of 1925 held for life or lives or for years, with a perpetual right of renewal[1], subject or not to the fulfilment of any conditions, then the estate of the copyholder was converted into a freehold in fee simple. For this purpose the general enfranchisement provisions applied[2], and the enfranchised land vested in accordance with the provisions of the Twelfth Schedule to the Law of Property Act 1922[3], but as if the person who at the commencement of the Act was the admitted tenant, or had the best right to be admitted in respect of the renewable interest, had been admitted, or (as the case might be) had the best right to be admitted, in respect of the inheritance[4].

1 It was essential to support a custom of renewing copyholds for lives, that the custom should require payment of a fine certain: see *Duke of Grafton v Horton* (1726) 2 Bro Parl Cas 284, HL; *Lord Abergavenny v Thomas* (1739) 3 Anst 668 note (a); *Wharton v King* (1796) 3 Anst 659; Scriven on Copyholds (7th Edn) 201, 494. A custom to renew copyholds could only be supported by immemorial usage, and if the custom failed to point out the person from time to time entitled to this benefit, it was liable to be impeached for uncertainty. In the absence of such custom, the benefit or tenant right of renewal, as it was commonly called, was a matter of pure grace and favour with the lord: 1 Watkins on Copyholds (4th Edn) 62n. See generally CUSTOM AND USAGE.

2 Law of Property Act 1922 s 135 (repealed); for the provisions so applied see PARAS 32-33 ante. Where there was a perpetually renewable underlease derived out of an interest in perpetually renewable copyhold land, it was the latter which was enfranchised; the former became a term of 2,000 years less one day: see s 145, Sch 15 para 2(1); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 541.

3 See PARA 36 et seq ante.

4 Law of Property Act 1922 s 135 (repealed); see also Sch 12 para (8)(e) (repealed), cited at para 37 note 9 ante. Where the last admitted tenant had died before the commencement of the Act, his personal representatives were deemed to have had the best right to be admitted, but without prejudice to the beneficial rights of persons claiming under his will or on intestacy: s 135 (repealed).

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(v) Crown and Duchy Manors

42. Effect of enfranchisement on Crown and Duchy manors.

The provisions for enfranchisement under common law and statute prior to 1925 did not normally apply to Crown manors[1]. The policy of excluding Crown manors was not adopted in the Law of Property Act 1922, and it was provided that Part V of the Act, which abolished copyhold and customary tenure[2], should extend to manors or lands of the Crown, or of the Duchy of Lancaster, or of the Duchy of Cornwall, for any estate, whether in possession, reversion or remainder; and (1) as respects Crown land, the Commissioners of Crown Land (now the Crown Estate Commissioners)[3] were, (2) as respects Duchy of Lancaster land, the Chancellor of the Duchy was, and (3) as respects land of the Duchy of Cornwall, such person as the Duke of Cornwall might appoint was, for the purposes of the Act, entitled to act in the name and on behalf of the lord or tenant, as the case might require[4].

Further, it was provided that Part VI of the Law of Property Act 1922, relating to the extinguishment of manorial incidents, should extend to manors or lands of the Crown, or of the Duchy of Lancaster, or of the Duchy of Cornwall[5], and in respect of such extinguishment the provisions of the Copyhold Act 1894, as applied by the Law of Property Act 1922, applied to the same extent as in the case of other manors or lands[6].

1 See eg the Copyhold Act 1894 ss 95(f), 96(b) (both repealed).

2 See PARAS 32-35 ante.

3 As to the commissioners see CROWN PROPERTY.

4 Law of Property Act 1922 s 134 (repealed).

5 Ibid s 141(1) (repealed). The persons mentioned in s 134 (repealed) (see the text to note 4 supra) were entitled to act on behalf of the Crown, the Duchy of Lancaster and the Duchy of Cornwall respectively for the purpose of extinguishment under Pt VI: Manorial Incidents (Extinguishment) Rules 1925, SR & O 1925/810, r 46(1) (spent).

6 Law of Property Act 1922 s 143(1) (repealed). The stewardship of a Crown manor is still an office of profit under the Crown: see further CUSTOM AND USAGE.

(6) THE PROPERTY LEGISLATION OF 1925

(i) General Principles of the 1925 Legislation

43. Introduction.

The statutory reforms of the nineteenth century[1] were carried further by a series of statutes passed between 1922 and 1926[2]. The main object of the 1925 legislation was to facilitate and cheapen the transfer of land. This was accomplished by the abolition of copyhold tenure[3] and other anachronisms[4], the reduction of legal estates to two[5], the abolition of legal tenancies in common[6], the extension of the system of registration of charges[7] and of title[8], and the assimilation, so far as was possible, of the law of real property to that of personal property[9].

1 For the statutory reforms of the nineteenth century see PARA 28 et seq ante.

2 The Law of Property Act 1922 contained amendments affecting the whole field of property law. Many further amendments were made by the Law of Property (Amendment) Act 1924. Both Acts were due to come into operation on 1 January 1926 (Law of Property Act (Postponement) Act 1924 s 1 (repealed); Law of Property (Amendment) Act 1924 s 12(3) (repealed)), but the greater part of both Acts was repealed before that date and their substance re-enacted in the following seven Acts: the Settled Land Act 1925; the Trustee Act 1925; the Law of Property Act 1925; the Land Registration Act 1925; the Land Charges Act 1925 (repealed and replaced by the Land Charges Act 1972 and the Local Land Charges Act 1975: see LAND CHARGES); the Administration of Estates Act 1925; and the Universities and College Estates Act 1925. These seven Acts, together with the unrepealed portions of the Law of Property Act 1922, the Law of Property (Amendment) Act 1924, and the Law of Property (Amendment) Act 1926, are collectively referred to as the 1925 legislation.

3 As to the abolition of copyhold tenure see PARA 31 et seq ante.

4 As to the abolition of such other anachronisms see eg para 18 note 10 ante (repeal of the Statute of Uses); para 102 post (abolition of interesse termini); para 157 post (abolition of curtesy); para 161 post (abolition of dower); and PARA 172 post (abolition of the rule in *Shelley's Case* (1581) 1 Co Rep 93b).

5 As to the reduction of legal estates to two see PARA 45 post.

6 As to the abolition of legal tenancies in common see PARA 55 post.

7 As to the present system of registration of charges see LAND CHARGES.

8 The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

9 See eg para 93 post (abolition of necessity for words of limitation); and PERSONAL PROPERTY vol 35 (Reissue) PARA 1230 (entailed interests in personalty: but note that it is no longer possible to create such interests: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARA 105 post).

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44. Reclassification of estates.

By the enfranchisement of all copyhold land[1] the tenures of land were reduced to two, freehold and leasehold, and, since the enfranchisement was deemed to have been effected immediately before the commencement of the Law of Property Act 1925[2], that Act operated only on freehold and leasehold land. Previously to that commencement it had been possible to create a great variety of legal estates in land[3], but this was changed and the legal estates were reduced to two, the fee simple and a term of years[4]. There was also a similar restriction on the creation of legal interests in rights in land of the nature of incorporeal hereditaments[5]. Legal estates and interests subsisting as such before 1 January 1926[6], but which could no longer take effect at law, became equitable interests[7], and provision was made for the getting in of outstanding legal estates[8]. The extensive changes thus made in the arrangement of legal estates and equitable interests took effect automatically on 1 January 1926 in accordance with special transitional provisions[9].

1 Ie under the Law of Property Act 1922 s 128 (repealed): see PARA 31 et seq ante.

2 See the Law of Property Act 1925 s 202; and PARA 32 ante.

3 Thus an estate in fee simple, which was the fullest form of ownership, might be divided into concurrent or successive estates; concurrent, as in joint tenancy or tenancy in common; successive, where the division was between a present estate, such as a life estate, and remainders. As to the various estates which might exist at law see PARAS 91 et seq post (legal estates), 114 et seq post (equitable interests). This great variety of legal estates had their counterpart in equity as equitable estates as well. As to the growth of 'estates' see 3 Holdsworth's History of English Law 101 et seq.

4 As to the reduction of legal estates to two see PARA 45 post.

5 As to similar restrictions on the creation of legal interests in rights in land see PARA 45 post.

6 Ie the date of commencement of the Law of Property Act 1925: see s 209(2) (repealed).

7 As to equitable interests see PARA 46 post.

8 As to outstanding legal estates see PARA 140 post.

9 As to the transitional provisions see PARA 49 et seq post.

45. Legal estates.

The only estates in land[1] which are capable of subsisting or of being conveyed or created at law are an estate in fee simple absolute in possession[2], and a term of years absolute[3]; and the only interests or charges in or over land which are capable of subsisting or of being created at law are (1) an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute[4]; (2) a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute[5]; (3) a charge by way of legal mortgage[6]; (4) (formerly) land tax[7] and tithe rentcharge[8], and any other similar charge on land which is not created by an instrument[9]; and (5) rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge[10].

1 For the meaning of 'land' see PARAS 76-77 post. The word here seems to denote the land itself or some part of it as a physical object; but generally the provisions of the Law of Property Act 1925 relating to freehold land apply to manors, reputed manors, lordships, advowsons, perpetual rentcharges and other incorporeal hereditaments, subject to the qualifications necessarily arising by reason of the inherent nature of the hereditament affected: s 201(1) (amended by the Tithe Act 1936 s 48(3), Sch 9 to remove the former reference to tithe, which is now extinguished: see PARA 78 note 3 post).

2 Law of Property Act 1925 s 1(1)(a). For the purposes of the Law of Property Act 1925 a fee simple which is liable to be divested by virtue of the Lands Clauses Acts or any similar statute is nonetheless absolute and remains liable to be divested as if that Act had not been passed; and a fee simple subject to a legal or equitable right of entry or re-entry, or a fee simple vested in a corporation which is liable to determine by reason of the dissolution of the corporation, is a fee simple absolute for the statutory purposes: see the Law of Property Act 1925 s 7(1), (2) (amended by the Law of Property Amendment Act 1926 s 7, Schedule; and by the Reverter of Sites Act 1987 s 8(2), (3), Schedule, which removed the words 'the School Sites Acts' which preceded the words 'or any similar statute'). As to the School Sites Acts see EDUCATION vol 15(2) (2006 Reissue) PARA 1354 and as to the Reverter of Sites Act 1987 see CHARITIES vol 8 (2010) PARA 70 et seq. As to the Lands Clauses Acts see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 503, 509 et seq. For the meaning of 'similar statute' see *Tithe Redemption Commission v Runcorn UDC* [1954] Ch 383, [1954] 1 All ER 653, CA (the Local Government Act 1929 s 29(2) (repealed: see now the Highways Act 1980 ss 263(1), (2), 264(1) (as amended) (vesting of highways and drains); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 225-226), held to constitute a 'similar statute'). As to rights of entry and re-entry see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 603 et seq; and as to giving effect to an equitable right of re-entry by conveyance of the legal estate see the Law of Property Act 1925 s 3(3) (as amended); and PARA 187 post. As to the effect of the dissolution of a corporation see PARA 91 note 6 post; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304.

In the Law of Property Act 1925, unless the context otherwise requires, 'possession' includes receipt of rents and profits or the right to receive the same, if any: s 205(1)(xix).

3 Ibid s 1(1)(b). For the meaning of 'term of years absolute' see s 205(1)(xxvii); and PARA 101 post.

4 Ibid s 1(2)(a).

5 Ibid s 1(2)(b). As to rentcharges generally see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

6 Ibid s 1(2)(c). See also s 87(1); and MORTGAGE vol 77 (2010) PARAS 104, 117 et seq. Mortgages by demise are protected by a legal estate, ie the mortgage term, and are within s 1(1). A chargee by way of legal mortgage has no actual term, although he has the same protection as if he were a mortgagee by demise: see s 87(1).

7 The words 'land tax' were repealed by the Finance Act 1963 s 73(8)(b), Sch 14 Pt IV consequent on the abolition of that tax. The words are retained in the text for their effect on the meaning of 'any other similar charge'.

8 Tithe rentcharge was extinguished as from 2 October 1936: see ECCLESIASTICAL LAW. The reference to tithe rentcharge is retained in the text for its possible effect on the meaning of 'any other similar charge'.

9 Law of Property Act 1925 s 1(2)(d) (as amended: see notes 7-8 supra).

10 Ibid s 1(2)(e). A right of entry on breach of covenant reserved in an assignment of a lease and limited to a perpetuity period is not within head (5) in the text, and thus is merely equitable: see *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL. As to the disposition and exercise of rights of entry see the Law of Property Act 1925 s 4(2), (3); para 231 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 608-609.

UPDATE

45 Legal estates

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(6) THE PROPERTY LEGISLATION OF 1925/(i) General Principles of the 1925 Legislation/46. Equitable interests.

46. Equitable interests.

All estates, interests and charges in or over land (other than those which can subsist at law[1]) such as estates tail, life interests and remainders, take effect as equitable interests[2]. To ensure that no beneficial forms of property are lost by this rearrangement of estates and interests, all interests in land validly created or arising after the commencement of the Law of Property Act 1925[3] which are not capable of subsisting as legal estates must take effect as equitable interests; and, save as otherwise expressly provided by statute[4], interests in land which, under the Statute of Uses[5] or otherwise, could before that commencement have been created as legal interests are capable of being created as equitable interests[6].

It has been held that a secure tenant's right to buy under the Housing Act 1985 is not an equitable interest; the tenant acquires no proprietary interest whatever until the grant of the freehold[7].

1 As to legal estates see PARA 45 ante. For the meaning of 'land' see PARAS 76-77 post.

2 See the Law of Property Act 1925 s 1(3). The descriptions of legal estates and equitable interests contained in s 1(1)-(3) (as amended) are repeated as definitions in s 205(1)(x) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4) ('legal estates' mean the estates, interests and charges, in or over land (subsisting or created at law) which are by the Law of Property Act 1925 authorised to subsist or to be created as legal estates; 'equitable interests' mean all the other interests and charges in or over land).

3 The date of commencement of the Law of Property Act 1925 was 1 January 1926: s 209(2) (repealed).

4 Eg leases for lives at a rent cannot be created either at law or in equity: see ibid s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

5 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante).

6 Law of Property Act 1925 s 4(1). Thus all interests which could have been created under the Statute of Uses (1535) (repealed) can still be created, although by way of trust; eg a shifting use can be created as a shifting trust: see PARA 182 post. However, after 1925 (and save as expressly enacted) an equitable interest in land is only capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before 1926: Law of Property Act 1925 s 4(1) proviso.

7 See *Bristol City Council v Lovell* [1998] NLJR 329, [1998] NPC 31, HL, overruling *Dance v Welwyn Hatfield District Council* [1990] 3 All ER 572, [1990] 1 WLR 1097, CA. As to the right to buy see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1795 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(6) THE PROPERTY LEGISLATION OF 1925/(i) General Principles of the 1925 Legislation/47. Meaning of 'legal estate' and 'estate owner'.

47. Meaning of 'legal estate' and 'estate owner'.

The expression 'legal estate' is used in the Law of Property Act 1925 to mean the estates, interests and charges which are authorised to subsist or to be conveyed or created at law; and the owner of a legal estate is referred to as an 'estate owner' and his legal estate is referred to as his estate[1]. Such estates have the same incidents as legal estates subsisting at the commencement of the Act[2]. A legal estate may subsist concurrently with or subject to any other legal estate in the same land in like manner as it could have done before 1 January 1926[3]. Estates, interests and charges in or over land which are not legal estates are referred to in the Law of Property Act 1925 as 'equitable interests'[4].

1 See the Law of Property Act 1925 s 1(4).

2 Ibid s 1(4). The date of commencement of the Law of Property Act 1925 was 1 January 1926: s 209(2) (repealed). As to the protection given by the legal estate see MORTGAGE vol 77 (2010) PARA 104.

3 Ibid s 1(5). Thus, under a succession of freehold mortgages by demise, the successive mortgage terms will subsist concurrently with each other and with the fee simple estate in the mortgagor: see s 85(2), Sch 1 Pts VII, VIII; and MORTGAGE vol 77 (2010) PARA 187. For the meaning of 'land' see PARAS 76-77 post.

4 See ibid s 1(8).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(6) THE PROPERTY LEGISLATION OF 1925/(i) General Principles of the 1925 Legislation/48. Protection of equitable interests.

48. Protection of equitable interests.

The estates which by the Law of Property Act 1925 are authorised to subsist as legal estates[1] have the same incidents as legal estates subsisting at the commencement of the Act[2]. One of these incidents was that a conveyance of a legal estate to a purchaser would overreach any equitable interest of which the purchaser had no notice, either actual or constructive[3].

In order to afford protection against this risk in the case of unregistered land, provision is made for various kinds of equitable interests to be registered as land charges. Thus an equitable charge which is not secured by a deposit of documents relating to the legal estate affected, and does not arise under a trust of land[4], or a settlement, can be registered as a general equitable charge[5], and an easement for life (which cannot subsist as a legal easement) can be registered as an equitable easement[6]. Such registration is deemed to constitute actual notice of the charge to all persons and for all purposes. Consequently a purchaser of the legal estate cannot plead that he is a purchaser for value without notice and so take free from the charge[7].

Dealings with equitable interests in land subject to a trust of land[8] or in settled land can be protected by giving notice to the trustees of the trust of land or the settlement[9].

In the case of registered land, equitable interests may be protected by notices and cautions under the Land Registration Act 1925[10]. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990[11] and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1997 with effect from 1 April 1998[12].

1 See the Law of Property Act 1925 s 1(1); and PARA 45 ante.

2 Ibid s 1(4). The Law of Property Act 1925 came into force on 1 January 1926: s 209(2) (repealed).

3 As to the principle that equity favours a purchaser for value without notice, and as to notice, see EQUITY vol 16(2) (Reissue) PARA 565 et seq.

4 For the meaning of 'trust of land' see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and PARA 66 post.

5 See the Land Charges Act 1972 s 2(1), (4)(iii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 12(1), (2)); see also the Land Charges Act 1972 s 18(6).

6 See ibid ss 2(1), 5(iii); see also s 18(6).

7 See the Law of Property Act 1925 s 198(1) (as amended); and LAND CHARGES. If the charge is not registered a purchaser of a legal estate, and in some cases a purchaser of any interest in the land, takes free from it: see LAND CHARGES. As to land charges generally see LAND CHARGES.

8 See note 4 supra.

9 See the Law of Property Act 1925 s 137 (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(1), (15)), extending to equitable interests in land the rule in *Dearle v Hall, Loveridge v Cooper* (1828) 3 Russ 1; and CHOSES IN ACTION vol 13 (2009) PARA 43 et seq.

10 See generally see LAND REGISTRATION.

11 See the Registration of Title Order 1989, SI 1989/1347; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 827

12 See the Land Registration Act 1997 s 1, substituting the Land Registration Act 1925 s 123 and adding s 123A; and LAND REGISTRATION.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(6) THE PROPERTY LEGISLATION OF 1925/(ii) The Transitional Provisions/A. IN GENERAL/49. Operation and objects of transitional provisions.

(ii) The Transitional Provisions

A. IN GENERAL

49. Operation and objects of transitional provisions.

The changes in the arrangement of legal estates and equitable interests made by the Law of Property Act 1925 were carried into effect automatically at the commencement of the Act[1] by transitional provisions, the objects of which were stated in the Act[2], the provisions themselves being set out in a Schedule[3]. The enfranchisement of copyhold land under the Law of Property Act 1922[4], which was brought into operation at the same time as the Law of Property Act 1925[5],

was deemed to have been effected immediately before the commencement of the Law of Property Act 1925[6], and the transitional provisions operated in respect of the freehold land into which the copyholds were converted[7]. Similarly, the conversion of perpetually renewable leaseholds into leases for 2,000 years[8], and of leases at a rent for lives, or for a term of years determinable with lives, or on marriage, into terms of years determinable on notice on the dropping of the life or last life or on the marriage[9], was deemed to have been effected immediately before the commencement of the Law of Property Act 1925[10].

So far as the transitional provisions relate to mortgaged land they are considered elsewhere in this work[11].

The objects of the transitional provisions were (1) to convert existing[12] legal estates, interests and charges, not capable under the Law of Property Act 1925 of taking effect as legal interests, into equitable interests[13]; (2) to discharge, get in or vest outstanding legal estates[14]; (3) to provide with respect to legal estates vested in minors[15]; (4) to subject land held in undivided shares to trusts[16]; (5) to deal with party structures and open spaces held in common[17]; (6) to convert tenancies by entireties into joint tenancies[18]; and (7) to convert existing freehold and leasehold mortgages into mortgages by demise and sub-demise respectively[19].

1 Ie 1 January 1926: see the Law of Property Act 1925 s 209(2) (repealed).

2 See ibid s 39 (as amended); and the text and notes 3-19 infra.

3 Ie ibid s 39, Sch 1 (as amended); and PARA 50 et seq post.

4 As to the enfranchisement of copyhold land see PARA 31 et seq ante.

5 The date of commencement of the Law of Property Act 1922 was at first fixed for 1 January 1925 (s 191(2) (repealed)), but it was postponed by the Law of Property Act (Postponement) Act 1924 to 1 January 1926 (s 1 (repealed)).

6 See the Law of Property Act 1925 s 202.

7 See *Re King's Theatre, Sunderland, Denman Picture Houses Ltd v Thompson and Collins Enterprises Ltd* [1929] 1 Ch 483.

8 Ie under the Law of Property Act 1922 s 145, Sch 15: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 541.

9 Ie under the Law of Property Act 1925 s 149(6), which reproduced the Law of Property Act 1922 Sch 15 para 7(3) (repealed): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

10 See the Law of Property Act 1925 s 202.

11 As to the transitional provisions with regard to mortgaged land see MORTGAGE vol 77 (2010) PARA 101 et seq.

12 Ie existing prior to the commencement of the Law of Property Act 1925: *Re Ryder and Steadman's Contract* [1927] 2 Ch 62, CA. The Act came into operation on 1 January 1926: see s 209(2) (repealed).

13 Law of Property Act 1925 s 39(1). As to the conversion of limited legal estates see PARA 50 post.

14 Ibid s 39(2). As to the extinguishment of needless estates see PARA 51 post; and as to the vesting of outstanding legal estates see PARA 52 et seq post.

15 See ibid s 39(3). As to land vested in minors (referred to as 'infants' in the statute) see PARA 54 post.

16 See ibid s 39(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (10)). See further PARA 55 et seq post.

17 Law of Property Act 1925 s 39(5). As to party structures and open spaces see PARAS 62-63 post.

18 Ibid s 39(6). As to tenancies by entireties see PARAS 227-228 post.

19 Ibid s 39(7), (8). Mortgagees in whom the fee simple had been vested immediately before 1 January 1926 took in lieu a term of 3,000 years, and mortgagees of leaseholds by assignment became mortgagees by sub-demise: see Sch 1 Pts VII, VIII; and see generally MORTGAGE vol 77 (2010) PARA 101 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(6) THE PROPERTY LEGISLATION OF 1925/(ii) The Transitional Provisions/A. IN GENERAL/50. Conversion of limited legal estates.

50. Conversion of limited legal estates.

In pursuance of the first object of the transitional provisions of the Law of Property Act 1925[1], it was provided that all estates, interests and charges in or over land, including fees determinable whether by limitation or condition[2], which immediately before the commencement of the Law of Property Act 1925[3] were estates, interests or charges subsisting at law, or capable of taking effect as such, but which by virtue of Part I of that Act[4] were not capable of taking effect as legal estates, must as from that date be converted into equitable interests[5]. Such former legal estates were not to fail by being converted into equitable interests either in the land or the proceeds of sale of the land[6], nor was the priority of any such estate, charge or interest over other equitable interests to be affected[7].

1 For the first object of the transitional provisions see PARA 49 head (1) ante.

2 As to estates in fee upon condition see PARA 97 post. As to determinable fees see PARA 114 post. Estates in fee simple determinable on condition remained capable of subsisting as legal estates: see the Law of Property Act 1925 s 7(1) (as amended); and PARA 91 post.

3 Ie 1 January 1926: ibid s 209(2) (repealed).

4 Ibid Pt I (ss 1-39) (as amended) contained the general principles as to legal estates, equitable interests and powers, including the new classification of legal and equitable estates.

5 Ibid s 39(1), Sch 1 Pt I. A legal term existing under a settlement was not affected by this provision, but as from the date of the principal vesting deed or a vesting order it was converted into an equitable term, unless it had become vested in a mortgagee: see the Settled Land Act 1925 s 37, Sch 2 para 1(6) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule).

6 In the case of undivided shares in land, the legal estate which might formerly exist in such a share was converted, by reason of the statutory trust for sale imposed on the entirety, into a share in the proceeds of sale, and was included as an 'equitable interest' by the words 'or in the proceeds of sale thereof' in the definition of 'equitable interests' in the Law of Property Act 1925 s 205(1)(x) (now amended, removing those words, by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). This appears to have been overlooked in *Re Price* [1928] Ch 579, where an entailed interest in an undivided share was held to have become an absolute interest; but this was abrogated by the Law of Property (Entailed Interests) Act 1932 s 1(2) (repealed). See also *Re Grant of King Charles II, Giffard v Penderel-Brodhurst* (1936) 80 Sol Jo 92. Note that, where on 1 January 1997 land was held on trust for sale, or on the statutory trusts, by virtue of the Law of Property Act 1925 Sch 1 (as amended), it is on or after that date to be held in trust for the persons interested in the land: Trusts of Land and Appointment of Trustees Act 1996 ss 5(1), 27(2), Sch 2 para 7. See PARAS 55 note 8, 56 note 16 post.

7 Law of Property Act 1925 Sch 1 Pt I. As to the priority conferred by the legal estate see MORTGAGE vol 77 (2010) PARA 101 et seq.

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51. Extinguishment of needless estates.

The reduction of legal estates to two, namely the fee simple and a term of years, did not exclude the possibility of both forms subsisting at the same time, and it was provided by the Law of Property Act 1925 that a legal estate might subsist concurrently with or subject to any other legal estate in the same land in the same manner as it could have done before the Act[1]. Thus the freehold estate might be subject to a term of years, and a term of years might be subject to a sub-term. The cesser of a satisfied term carved out of the freehold had been provided for by the Satisfied Terms Act 1845[2], so this case did not require any transitional provision; but on account of the extension of the provision for cesser to sub-terms[3] it was provided that a sub-term[4] which was satisfied at the commencement of the Law of Property Act 1925[5] should merge in the reversion and should cease[6].

General provision was made for the discharge of inferior legal estates which were outstanding on 1 January 1926. Thus, where immediately after the commencement of the Law of Property Act 1925 any owner of a legal estate was entitled, subject or not to the costs of tracing the title and conveyance, to require any other legal estate in the same land to be surrendered, released or conveyed to him, so as to merge or be extinguished, then that last-mentioned estate was extinguished, but without prejudice to any protection which would have been afforded to him had that estate remained subsisting[7].

1 Law of Property Act 1925 s 1(5): see PARA 47 ante.

2 The Satisfied Terms Act 1845 (repealed) is reproduced in the Law of Property Act 1925 s 5(1): see PARA 113 post.

3 Ie by ibid s 5(2): see PARA 113 text and note 4 post.

4 Ie a term of years created or limited out of leasehold land.

5 Ie 1 January 1926: Law of Property Act 1925 s 209(2) (repealed).

6 Ibid s 39(2), Sch 1 Pt II para 1. Where the sub-term was vested in the owner of the leasehold reversion, the cesser was without prejudice to any protection which the sub-term, if it remained subsisting, would afford to the owner of the reversion: see Sch 1 Pt II para 1. Where the sub-term was satisfied as to part only of the land comprised in it, the cesser took effect as if a separate sub-term had been created in regard to that part of the land: Sch 1 Pt II para 1.

7 See ibid Sch 1 Pt II para 2, which is limited to cases where the owner of a higher estate can call for the conveyance of a lower estate which, if conveyed to him, would merge or be extinguished in the higher estate. Consequently it does not apply to the getting in of the nominal reversion by a mortgagee by sub-demise: *Peachy v Young* [1929] 1 Ch 449 at 458.

B. VESTING OF OUTSTANDING LEGAL ESTATES

52. In general.

The transitional getting in or vesting of outstanding legal estates was effected by the provision that where immediately after the commencement of the Law of Property Act 1925[1] any person

was entitled, subject or not to the costs of tracing the title and of conveyance, to require any legal estate (not then vested in trustees for sale[2]) to be conveyed to or otherwise vested in him, then by virtue of the transitional provisions[3], that legal estate vests in the manner provided[4]. Conveyancing under the Law of Property Act 1925 is based on the holding of the legal estate, and the object of this provision was, at the commencement of the new system, to vest the legal estate in the person who was entitled to dispose of it. Consequently the provision had to be adapted to the various modes in which title could be made. These were divided into (1) title where the land was subject to a mortgage[5]; (2) title where the land was vested in trustees for sale[6]; (3) title where the land was settled land[7]; and (4) title in other cases[8]. In reference to these cases a distinction must be made between the getting in of a legal estate which was outstanding before the commencement of the 1925 Act, and the vesting of a legal estate which had been displaced by that Act[9].

Any legal estate acquired by virtue of the vesting provisions was to be held upon the trusts, and subject to the powers, provisions, rents, covenants, conditions, rights of redemption as respects terms of years absolute, and other rights, burdens and obligations, if any, upon or subject to which the estate acquired ought to be held[10]. Where the land was at the commencement or by virtue of the Law of Property Act 1925, or any Act coming into operation at the same time[11], or was by virtue of any statute, made subject to a trust for sale, the legal estate affected[12] vested in the trustees for sale[13], including personal representatives holding land on trust for sale, but subject to any mortgage term subsisting or created by the Law of Property Act 1925[14].

Where at the commencement of the Law of Property Act 1925, or by virtue of any statute coming into operation at the same time[15], the land was settled land, the legal estate affected[16] vested in the tenant for life or statutory owner[17] entitled under the Settled Land Act 1925 to require a vesting deed to be made in his favour[18], or in the personal representative, if any, in whom the land might be vested[19], or the Public Trustee[20], as the case might require, but subject to any mortgage term subsisting or created by the Law of Property Act 1925[21]. This provision regulated the vesting of any legal estate in settled land which was outstanding at the commencement of that Act, and also the legal estate in fee simple or the term which until then had been divided between the tenant for life and remaindermen, but was displaced by that Act[22].

In any other case, the legal estate affected vested in the person of full age[23] who, immediately after the commencement of the Law of Property Act 1925, was entitled (subject or not to payment of costs and any customary payments) to require the legal estate to be vested in him, but subject to any mortgage term subsisting or created by that Act[24]. This direction, taken with the general vesting provision[25], applied where land had been placed in the name of a nominee who was in fact a trustee for the real owner, and it operated to divest the legal estate out of the trustee and place it in the real owner. This proved inconvenient where the deeds had been left in the possession of the trustee so that he was the apparent legal owner, and accordingly it was provided that in such a case the divesting of the legal estate by the general divesting provision should not operate to prevent the legal estate from being conveyed, or a legal estate from being created, by the trustee in favour of a purchaser for money or money's worth, if the purchaser had no notice of the trust, and if the documents of title relating to the estate divested were produced by the trustee or by persons deriving title under him[26].

1 Ie 1 January 1926: Law of Property Act 1925 s 209(2) (repealed).

2 A trust for sale at that time being one of the modes of making title, there was no need to shift a legal estate already vested in trustees for sale. As to the replacement as from 1 January 1997 of the statutory trusts for sale by trusts of land see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5(1), 27(2), Sch 2 paras 5, 7; and PARAS 50 note 6 ante, 66 post. A trust for sale of land may, however, still be created by a disposition: see s 4(1); and PARA 66 post.

3 Ie by virtue of the Law of Property Act 1925 Sch 1 Pt II.

4 Ibid s 39(2), Sch 1 Pt II para 3. Schedule 1 Pt II para 3 applied, without prejudice to any claim in respect of fines, fees and other customary payments, to a person who, under a surrender or any disposition having the effect of a surrender, or under a covenant to surrender or otherwise, was immediately before 1 January 1926 entitled to require a legal customary estate of inheritance to be vested in him, or who immediately after that date became entitled to enfranchised land: Sch 1 Pt II para 3. As to the general statutory enfranchisement see PARA 31 et seq ante. An extension of the effect of the expression 'entitled to require' was made by Sch 1 Pt II para 4, under which any person who was entitled to an equitable interest capable of subsisting as a legal estate which had priority over any legal estate in the same land was deemed to be entitled to require a legal estate to be vested in him equivalent to the equitable interest. However, this did not apply where the equitable interest was capable of being overreached by virtue of a subsisting trust for sale or a settlement; nor did it operate to prevent that person from acquiring any other legal estate under Sch 1 Pt II to which he might be entitled: Sch 1 Pt II para 4 proviso; and see note 2 supra. Thus an equitable rentcharge had priority over the fee simple estate in the land itself, and might under this provision be converted into a legal rentcharge: *Re King's Theatre, Sunderland, Denman Picture Houses Ltd v Thompson and Collins Enterprises Ltd* [1929] 1 Ch 483 at 495. An equitable interest 'capable of subsisting as a legal estate' means, unless the context otherwise requires, such as could validly subsist or be created as a legal estate under the Law of Property Act 1925: see s 205(1)(x).

5 See ibid Sch 1 Pt II para 6(a); and see further MORTGAGE vol 77 (2010) PARA 101 et seq.

6 See ibid Sch 1 Pt II para 6(b); and the text and notes 11-14 infra.

7 See ibid Sch 1 Pt II para 6(c); and the text and notes 15-21 infra.

8 See ibid Sch 1 Pt II para 6(d); and the text and notes 22-24 infra.

9 Ie in consequence of the reduction of legal estates to two, namely the fee simple and a term of years. Where before the Law of Property Act 1925 the fee simple had been divided into a legal estate for life and a legal remainder in fee, both these estates became equitable, leaving the legal estate in the air. It was brought down to earth and revested by the transitional provisions.

10 Ibid Sch 1 Pt II para 8.

11 Thus, the Administration of Estates Act 1925 s 33 (as originally enacted) imposed a trust for sale on the real estate of a deceased intestate: see EXECUTORS AND ADMINISTRATORS; but see also note 2 supra.

12 Ie any estate which the trustees were entitled to require to be vested in them: Law of Property Act 1925 Sch 1 Pt II para 6.

13 See note 2 supra.

14 Law of Property Act 1925 Sch 1 Pt II para 6(b). Consequently, if before 1926 trustees held freehold land which was subject to a mortgage on trust for sale, and the legal estate was outstanding, the legal estate vested in the trustees for sale, and the mortgagee took a legal term of years.

15 Eg by the Settled Land Act 1925 s 1(1)(v), under which land held by a tenant in fee simple subject to a family charge became, on 1 January 1926, settled land, although it was not settled land before: *Re Earl of Carnarvon's Chesterfield Settled Estates* [1927] 1 Ch 138.

16 Ie any estate which a person was entitled to have vested in him as mentioned in the Law of Property Act 1925 Sch 1 Pt II para 3 (as amended). As regards settled land this was explained by Sch 1 Pt II para 5, which provided that for the purposes of Sch 1 Pt II (as amended) a tenant for life, statutory owner or personal representative should be deemed to be entitled to require to be vested in him any legal estate in settled land (whether or not vested in the Crown) which he was by the Settled Land Act 1925 given power to convey. Under s 72 he has power to convey the estate or interest vested or declared to be vested in him by the last or only vesting instrument, or any less estate or interest. Thus the tenant for life was, by the Law of Property Act 1925 Sch 1 Pt II para 5, brought within the general vesting provision of Sch 1 Pt II para 3 (as amended) and the settled land vested as provided by Sch 1 Pt II para 6(c). As to the statutory restrictions on the creation of strict settlements on or after 1 January 1997 see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 post.

17 'Statutory owner' means the trustees of the settlement or other persons who during a minority, or at any other time when there is no tenant for life, have the statutory powers of a tenant for life, but does not include the trustees of the settlement where by virtue of an order of the court or otherwise the trustees have power to convey the settled land in the name of the tenant for life: Settled Land Act 1925 s 117(1)(xxvi). The statutory owner is not included in the definition of 'tenant for life' (see s 117(1)(xxviii)), but the statutory powers of a tenant for life are expressly conferred on him (see ss 23, 26). Thus, the provisions mentioned in note 16 supra apply to him. See further SETTLEMENTS.

18 See ibid s 37, Sch 2 para 1(2).

19 See ibid Sch 2 para 2(1).

20 See ibid Sch 2 para 3(1) proviso.

21 Law of Property Act 1925 Sch 1 Pt II para 6(c).

22 Ie because by ibid s 1 (now as amended), an estate other than a fee simple or term of years absolute took effect as an equitable interest: see PARA 45 ante.

23 A corporation is treated as a person of full age: *Re Earl of Carnarvon's Highclere Settled Estates* [1927] 1 Ch 138. For the meaning of 'full age' see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

24 Law of Property Act 1925 Sch 1 Pt II para 6(d).

25 See ibid Sch 1 Pt II para 3 (as amended); and note 4 supra.

26 See the Law of Property (Amendment) Act 1926 s 7, Schedule, which introduced into the Law of Property Act 1925 Sch 1 Pt II para 3 (as amended) a provision to the effect stated in the text.

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53. Restrictions on automatic vesting.

The following restrictions were placed on the vesting provisions previously mentioned[1]. The provisions were not to operate:

34 (1) to vest in a mortgagee of a term of years absolute any nominal leasehold reversion which was held in trust for him subject to redemption[2];

35 (2) to vest in a mortgagee any legal estate except a term of years absolute[3];

36 (3) to vest in a person entitled to a leasehold interest, as respects such interest, any legal estate except a term of years absolute[4];

37 (4) to vest in a person entitled to a rentcharge, as respects such rentcharge, any legal estate except a legal estate in the rentcharge[5];

38 (5) to vest in a person entitled to an easement, right or privilege, with reference to it, any legal estate except a legal estate in the easement, right or privilege[6];

39 (6) to vest any legal estate in a person for an undivided share[7];

40 (7) to vest any legal estate in a minor (referred to in the legislation as 'an infant')[8];

41 (8) to affect prejudicially the priority of any mortgage or other incumbrance or interest subsisting at the commencement of the Law of Property Act 1925[9];

42 (9) to render invalid any limitation or trust which would have been capable of taking effect as an equitable limitation or trust[10];

43 (10) to vest in a purchaser or his personal representatives any legal estate which he had contracted to purchase, and in regard to which a contract, including an agreement to create a legal mortgage, was pending at the commencement of the 1925 Act or to render unnecessary the conveyance of that estate[11];

44 (11) to vest in charity trustees any legal estate vested in the former Official Trustee of Charity Lands[12];

45 (12) to vest in any person any legal estate which failed to pass to him by reason of his omission to be registered as proprietor[13];

46 (13) to vest in any person any legal estate affected by any rent covenants or conditions if, before any proceedings were commenced in respect of the rent covenants or conditions, and before any conveyance of the legal estate or dealing therewith inter vivos was effected, he or his personal representatives disclaimed it in writing signed by him or them[14].

1 See the Law of Property Act 1925 s 39(2), Sch 1 Pt II para 7 (as amended); and heads (1)-(13) in the text. As to the vesting provisions previously mentioned see PARA 52 ante.

2 Ibid Sch 1 Pt II para 7(a).

3 Ibid Sch 1 Pt II para 7(b). Such vesting would have conflicted with the scheme for making all legal mortgages either by demise, or by a charge expressed to be by way of legal mortgage, usually called a legal charge: see ss 85-87, Sch 1 Pts VII, VIII; and MORTGAGE vol 77 (2010) PARA 191.

4 Ibid Sch 1 Pt II para 7(c). This would have conflicted with the provision that the only legal estate, other than an estate in fee simple absolute in possession, is a term of years absolute. As to this provision see s 1(1); and PARA 45 ante.

5 Ibid Sch 1 Pt II para 7(d). Thus an equitable rentcharge, if converted into a legal rentcharge, became either perpetual or for a term of years absolute: see s 1(2)(b); and *Re King's Theatre, Sunderland, Denman Picture Houses Ltd v Thompson and Collins Enterprises Ltd* [1929] 1 Ch 483 at 493. As to rentcharges see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

6 Law of Property Act 1925 Sch 1 Pt II para 7(e). To be a legal estate, the interest in the easement, right or privilege must be equivalent to a fee simple absolute in possession or a term of years absolute: s 1(2)(a).

7 Ibid Sch 1 Pt II para 7(f). A legal estate cannot subsist in an undivided share or be held by a minor: see s 1(6).

8 Ibid Sch 1 Pt II para 7(g); see also note 6 supra.

9 Ibid Sch 1 Pt II para 7(h). The Law of Property Act 1925 came into operation on 1 January 1926: see s 209(2) (repealed). Apart from this restriction the priority might be affected by the vesting of a legal estate in a later equitable incumbrancer: see MORTGAGE vol 77 (2010) PARA 284. 'Incumbrance', unless the context otherwise requires, includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum: s 205(1)(vii).

10 Ibid Sch 1 Pt II para 7(i). This restriction provided for the possibility of an equitable limitation, such as a limitation created by an executory instrument (see PARA 173 et seq post) being formerly valid in equity, but not at law. It remained valid although clothed with the legal estate.

11 Ibid Sch 1 Pt II para 7(j). This restriction operated although the consideration had been paid or satisfied and the title accepted: Sch 1 Pt II para 7(j). The vendor might have become a trustee for the purchaser, so that, but for the restriction, the legal estate would vest in the purchaser under Sch 1 Pt II para 3 (as amended). The restriction excluded this vesting and made a conveyance necessary.

12 Ibid Sch 1 Pt II para 7(k). As to the vesting of land in the Official Custodian for Charities (the successor both of the Official Trustee of Charity Lands and of the Official Trustees of Charitable Funds) see CHARITIES vol 8 (2010) PARA 297 et seq.

13 Ibid Sch 1 Pt II para 7(l). Under the Land Transfer Act 1897 s 20 (repealed), a purchaser, in a compulsory district, of freehold land which had not been placed on the register did not obtain the legal estate until he was registered as proprietor. Under the Land Registration Act 1925 the legal estate passes on conveyance, but is lost on failure to register within two months: see s 123 (substituted, and s 123A added, by the Land Registration Act 1997 s 1). A purchaser before the commencement of the Land Registration Act 1925 (ie 1 January 1926: s 148(2)) who failed to register, and so had not obtained the legal estate at that commencement, did not get it by the automatic vesting provision, but it became vested in him on registration after that date: see s 69(3). See further LAND REGISTRATION.

14 Law of Property Act 1925 Sch 1 Pt II para 7(m) (added by the Law of Property (Amendment) Act 1926 s 7, Schedule).

UPDATE

53 Restrictions on automatic vesting

NOTE 13--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

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54. Land vested in minors.

Since under the Law of Property Act 1925[1] a legal estate could not be vested in a minor (referred to as 'an infant' in the legislation)[2], it was necessary to provide for cases where land was so vested immediately before 1 January 1926. Under the Settled Land Act 1925 land which was vested in a minor became on that date settled land[3] and vested in the trustees, if any, of the settlement[4]. If there were no such trustees, then provision was made for their appointment, and pending the appointment of trustees, the land vested in the Public Trustee[5]. The transitional vesting provisions of the Law of Property Act 1925 relating to land vested in a minor are considered elsewhere in this work[6].

1 Ie under the Law of Property Act 1925 s 1(6): see PARA 14 note 6 ante.

2 In 1925, the age of majority was 21: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1; and see also PARA 3 (statutory definitions).

3 Settled Land Act 1925 s 1(1)(ii)(d).

4 Ibid s 37, Sch 2 para 3(1).

5 Ibid Sch 2 para 3(1) proviso (i). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 34.

6 As to the transitional provisions of the Law of Property Act 1925 relating to land vested in a minor see s 39(3), Sch 1 Pt III (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 34-36. The transitional provisions deal also with the case where the minor was a personal representative, trustee or mortgagee.

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C. UNDIVIDED SHARES

55. Imposition of trust for sale.

After 31 December 1925 a legal estate is not capable of subsisting in an undivided share in land[1]; thus provision had to be made for the vesting of the entirety of the land where the land was then held at law in undivided shares. In addition it was desired to avoid the great expense and trouble which usually attended partition actions. This was done by imposing on the land a trust for sale, so that the owners of undivided shares were no longer entitled to call for a

partition of the land, or, in lieu of partition, for a sale by the court, but were only entitled to shares of the net proceeds of sale[2]. However, under the former law, partition or sale by the court was the remedy of equitable owners of undivided shares as well as of legal owners. Thus in order to carry out the scheme of substituting a trust for sale for partition or sale by the court it was necessary to impose a trust for sale on land held in undivided shares where it was so held either at law or in equity. Therefore the transitional provisions provided both for the vesting of the legal estate in the entirety and for the imposition of a trust for sale; and accordingly where, immediately before the commencement of the Law of Property Act 1925[3], land was held at law or in equity in undivided shares[4] vested in possession[5], the provisions later referred to[6] became effective[7].

Where on 1 January 1997 land was held on trust for sale by virtue of the transitional provisions, it is on or after that date to be held in trust for the persons interested in the land[8].

1 Law of Property Act 1925 s 1(6).

2 The imposition of a trust for sale turned an undivided share of freehold land, which before 1926 was real estate, into personal estate. Any effect which this might have on the incidence and mode of payment of death duties (now abolished and replaced by inheritance tax) was prevented by ibid s 16(4) (repealed): *Re Wheeler, Jameson v Cotter* [1929] 2 KB 81n; *A-G v Public Trustee and Tuck* [1929] 2 KB 77; *Re Previté, Sturges v Previté* [1931] 1 Ch 447. There was no general enactment that beneficial interests should not be affected, and where a testator by a will made before 1926 had disposed of an undivided share of freehold land as being real estate and died after 1925 without having altered his will, the disposition failed: *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Newman, Slater v Newman* [1930] 2 Ch 409. Where, however, the will was confirmed, expressly or constructively, by a codicil made after 1925, this preserved the disposition of the share, notwithstanding that the codicil did not affect it: *Re Warren, Warren v Warren* [1932] 1 Ch 42; *Re Harvey, Public Trustee v Hosken* [1947] Ch 285, [1947] 1 All ER 349; and see *Re Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1 at 9, [1949] 2 All ER 419 at 422 per Harman J. As to partition proceedings commenced before 1926 see the Law of Property Act 1925 s 39(4) (as originally enacted), Sch 1 Pt IV para 1(11).

3 Ie 1 January 1926: ibid s 209(2) (repealed).

4 The land was not held in undivided shares where the two moieties had come to be held on the same uses and trusts, and the entirety was in the possession of the same person as tenant for life (*Re Egton Settled Estate, Foster v Foster* [1931] 2 Ch 180); and it seems that where a widow was entitled to dower out of land which had descended to the heirs, but, on 1 January 1926, dower had not been assigned, she and the heir were not tenants in common holding in undivided shares, although their position was analogous to that of tenants in common (*Williams v Thomas* [1909] 1 Ch 713 at 722, 726, 731, CA). It has been held that where land was vested in trustees in trust for partners, it was held in equity in undivided shares: *Re Fuller's Contract* [1933] Ch 652. The decision was convenient in practice, although not, perhaps, compatible with the doctrine that the beneficial interests of the partners in partnership land are personal estate: *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 432, CA.

5 Undivided shares which were subject to a long term, the rents and profits being applicable on the trusts of the term, were not vested in possession. This required the concurrence of two elements: (1) the absence of any antecedent freehold estate; and (2) present beneficial enjoyment by possession, physical or notional: *Re Earl of Stamford and Warrington, Payne v Grey* [1927] 2 Ch 217 at 221; *Re Stevens and Dunsby's Contract* [1928] WN 187.

6 Ie the transitional provisions made under the Law of Property Act 1925 s 39(4), Sch 1 Pt IV (as amended): see PARAS 56-61 post.

7 Ibid Sch 1 Pt IV para 1.

8 Trusts of Land and Appointment of Trustees Act 1996 ss 5(1), 27(2), Sch 2 para 7; and see PARA 66 post.

56. Undivided shares where entirety of land was vested in trustees or personal representatives.

If the entirety[1] of the land was vested in trustees[2] or personal representatives[3] (whether subject or not to incumbrances affecting the entirety or an undivided share) in trust for persons entitled in undivided shares, then, if the land was subject to incumbrances affecting undivided shares or to equitable incumbrances on the entirety[4], the entirety of the land vested free from such incumbrances in those trustees or personal representatives and was held by them upon the statutory trusts[5]; in any other case, the land was held by those trustees or personal representatives upon the statutory trusts[6].

For this transitional provision to apply, the persons entitled in undivided shares need not have been absolutely entitled. It was sufficient that they had a present interest in undivided shares. Thus the provision applied where the entirety of the land was vested in trustees on trust for tenants for life in undivided shares[7], or partly for tenants for life and partly for persons absolutely entitled[8]. When before 1926 the land was vested in trustees on trust for tenants for life in undivided shares so that it was settled land[9], it was at first assumed that the transitional provision which became effective where the entirety of the land was settled land[10] applied[11], but it was subsequently held that, since the land was vested in trustees, there was no need to go further[12]. The land, therefore, remained in the trustees on the statutory trusts[13]. Where, however, there were two or more tenants for life of full age[14] entitled under the same settlement in undivided shares, and, after the cesser of all their interests in the income of the settled land, the entirety of the land was limited so as to devolve together (not in undivided shares), their interests were, but without prejudice to any beneficial interest, converted into a joint tenancy[15]. Thus the land remained settled land and the statutory trusts were excluded.

Where on 1 January 1997 land was held on the statutory trusts by virtue of the transitional provisions, it is on or after that date to be held in trust for the persons interested in the land[16].

1 It is a question whether when the same trustees, A and B, held one moiety on one set of trusts and the other moiety on different trusts, the entirety was vested in them under the Law of Property Act 1925 s 39(4) (now as amended), Sch 1 Pt IV para 1(1), or whether they held the moieties separately, so that the entirety vested in the Public Trustee under Sch 1 Pt IV para 1(4). In *Re Hayward, Merson v Hayward* [1928] Ch 367, where the circumstances were of this nature, an order was made in chambers appointing trustees in the place of the Public Trustee on the assumption that the Law of Property Act 1925 Sch 1 Pt IV para 1(4) applied, but there is no report of any argument or decision on the point. In practice, the question is not important, since if it was Sch 1 Pt IV para 1(4) which applied, A and B could appoint themselves as trustees in the place of the Public Trustee under Sch 1 Pt IV para 1(4). They would then by virtue of such appointment hold as trustees of the trust of land: Sch 1 Pt IV para 1(4); Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 7. As to the Law of Property Act 1925 Sch 1 Pt IV para 1(4) see PARA 59 post.

2 This applied where there was only one trustee, although he would have to appoint an additional trustee in order to sell under the trust for sale: *Re Myhill, Hull v Myhill* [1928] Ch 100 at 103. See also *Re Dawson's Settled Estates* [1928] Ch 421.

3 The words 'in trustees or personal representatives' are qualified by the preceding words 'immediately before the commencement of this Act'. Thus where land was vested in personal representatives on trust under a settlement for two daughters of the settlor in undivided shares, a trust for sale was imposed by the Law of Property Act 1925 and the vesting provisions of Sch 1 Pt II (as amended) (see PARAS 51-53 ante), which took effect after the commencement of the 1925 Act, were excluded, so that the personal representatives continued to hold the land on trust for sale and the settlement trustees were not entitled, as otherwise they would have been, to call for a conveyance: *Re Forster, Somerville v Oldham* [1929] 1 Ch 146 at 149. As to the entirety being vested in personal representatives see *Re Collins, Towers v Collins* [1929] 1 Ch 201; *Re Hayden, Pask v Perry* [1931] 2 Ch 333 at 335. As to the general replacement of statutory trusts for sale with trusts of land see PARA 66 post.

4 The statutory wording is incumbrances 'affecting the entirety which, under this Act or otherwise, are not secured by legal terms of years absolute': Law of Property Act 1925 Sch 1 Pt IV para 1(1)(a). For the purposes of Sch 1 Pt IV (as amended), 'incumbrance' does not include a legal rentcharge affecting the entirety, land tax (now abolished), tithe rentcharge (now extinguished), or any similar charge on the land not created by an instrument: Sch 1 Pt IV para 1(12) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule).

5 As to the statutory trusts see the Law of Property Act 1925 s 35 (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and see the text and note 16 infra. They were a trust to sell and to hold the net proceeds of sale, after payment of costs, on the trusts requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance was not secured by a legal mortgage) interested in the land: see the Law of Property Act 1925 s 35 (repealed). The consent of an incumbrancer whose incumbrance had been divested was required for a sale under the statutory trusts, but a purchaser was not concerned to see or inquire whether such consent had been given: Sch 1 Pt IV para 1(9).

6 Ibid Sch 1 Pt IV para 1(1). Legal mortgages affecting the entirety were not disturbed, although, as in the case of legal mortgages generally (see PARA 49 ante), they were converted into term mortgages: see Sch 1 Pt IV para 1(8).

7 *Re Dawson's Settled Estates* [1928] Ch 421.

8 *Re Myhill, Hull v Myhill* [1928] Ch 100.

9 See the Settled Land Act 1882 s 2(6) (repealed), under which two or more persons beneficially entitled to possession of the settled land for their lives constituted the tenant for life.

10 See the Law of Property Act 1925 Sch 1 Pt IV para 1(4); and PARA 59 post.

11 See *Re Flint, Flint v Flint* [1927] 1 Ch 570; *Re Colyer's Farningham Estate* [1927] 1 Ch 677; *Re Higgs' and May's Contract* [1927] 2 Ch 249.

12 *Re Dawson's Settled Estates* [1928] Ch 421. The Law of Property Act 1925 Sch 1 Pt IV para 1(1) accordingly was held to apply.

13 If ibid Sch 1 Pt IV para 1(3) (see PARA 58 post), had applied, the land would have vested in the trustees of the settlement.

14 As to the attainment of full age see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

15 See the Law of Property Act 1925 Sch 1 Pt IV para 4 (added by the Law of Property (Amendment) Act 1926 s 7, Schedule). The joint tenants and the survivor of them, until the cesser occurs, constitute the tenant for life (Law of Property Act 1925 Sch 1 Pt IV para 4), and the legal estate vests in them under Sch 1 Pt II para 6(c) (see PARA 52 ante). The entirety of the land was not limited so as to devolve together (not in undivided shares) where, immediately before 1926, it was limited to tenants for their lives in undivided shares with remainder subject to a power of appointment. For Sch 1 Pt IV para 4 to apply the life estates must be followed by a vested indefeasible limitation not in undivided shares: *Re Colyer's Farningham Estate* [1927] 1 Ch 677 at 683. It does not apply where the trust on cesser of the life interests is for sale and division of the proceeds among a class (*Re Higgs' and May's Contract* [1927] 2 Ch 249; *Re Robins, Holland v Gillam* [1928] Ch 721); or the limitation is to the longest liver of a class of persons who are the life tenants (*Re Barrat, Body v Barrat* [1929] 1 Ch 336).

16 Trusts of Land and Appointment of Trustees Act 1996 ss 5(1), 27(2), Sch 2 para 7; and see PARA 66 post.

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57. Undivided shares where entirety of land was vested in tenants in common.

If the entirety of the land, not being settled land, was vested absolutely and beneficially in not more than four persons of full age entitled in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it vested in them as joint tenants upon the statutory trusts[1]. In this transitional provision 'settled land' means land which was settled land under the law existing before 1926[2].

1 Law of Property Act 1925 s 39(4) (now as amended), Sch 1 Pt IV para 1(2). Four is the maximum number of trustees under the Trustee Act 1925 s 34 (as amended): see TRUSTS vol 48 (2007 Reissue) PARA 804. The Law of Property Act 1925 Sch 1 Pt IV para 1(2) does not apply if one of the co-owners has incumbered his share, but its application is not prevented by a mortgage or other incumbrance on the entirety: Sch 1 Pt IV para 1(8). As to the replacement of the statutory trusts by trusts of land as from 1 January 1997 see PARAS 56 text and note 16 ante, 66 post. For the meaning of 'incumbrance' for these purposes see PARA 56 note 4 ante.

2 *Re Ryder and Steadman's Contract* [1927] 2 Ch 62, CA. This appears to have been contrary to the view of the draftsman of the Law of Property Act 1925: see Wolstenholme and Cherry's Conveyancing Statutes (12th Edn) 616. The decision was based on the object of the transitional provisions, which were intended to change the legal position existing previously to the Act into a new legal position, to take effect under and subsequent to the Act: *Re Ryder and Steadman's Contract* supra at 80 per Sargant LJ; *Re Catchpool, Harris v Catchpool* [1928] Ch 429 at 432. Thus where there were three persons absolutely and beneficially entitled in undivided shares, the Law of Property Act 1925 Sch 1 Pt IV para 1(2) was not excluded by the existence of a jointure rentcharge on the entirety. This made the land settled land after 1925 (see the Settled Land Act 1925 s 1(1)(v)), but not before (see *Re Earl of Carnarvon's Chesterfield Settled Estates* [1927] 1 Ch 138; and PARA 52 note 15 ante). In *Re Ryder and Steadman's Contract* [1927] 2 Ch 62, CA, the co-owners contracted to sell subject to the jointure rentcharge, but with the benefit of a covenant of indemnity against it. It was held that they had a title to sell in this manner under the statutory trusts. The statutory trusts did not enable the co-owners to overreach an equitable incumbrance on the entirety: *Re Parker's Settled Estates, Parker v Parker* [1928] Ch 247 at 259-260.

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58. Undivided shares where entirety of the land was settled land.

Where the entirety of the land was settled land[1], whether or not subject to incumbrances affecting the entirety or an undivided share, held under one and the same settlement, it vested, free from incumbrances affecting undivided shares, and from equitable incumbrances affecting the entirety[2], and free from any interests, powers and charges subsisting under the settlement, which had priority to the interests of the person entitled to the undivided shares, in the trustees, if any, of the settlement as joint tenants[3] upon the statutory trusts[4].

If there were no trustees of the settlement, then, pending their appointment, the land vested in the Public Trustee on the statutory trusts[5], but he was not entitled to act in the trust until requested in writing to act by or on behalf of persons interested in more than an undivided half of the land or the income of such[6]; and, if trustees of the settlement were appointed before the Public Trustee had accepted the trust, the land vested in them as joint tenants upon the statutory trusts[7].

1 Ie settled land under the law previous to 1926: *Re Ryder and Steadman's Contract* [1927] 2 Ch 62, CA.

2 Ie incumbrances which under the Law of Property Act 1925 or otherwise were not secured by a legal mortgage: s 39(4) (now as amended), Sch 1 Pt IV para 1(3) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule).

3 These were the trustees, if any, of the settlement under the law previous to the Law of Property Act 1925 (*Re Catchpool, Harris v Catchpool* [1928] Ch 429); but since the settled land was to vest in them as joint tenants, it did not vest in a single trustee (*Re Price, Price v Price* [1929] 2 Ch 400).

4 Law of Property Act 1925 s 39, Sch 1 Pt IV para 1(3) (as amended: see note 2 supra). As to the replacement as from 1 January 1997 of the statutory trusts by trusts of land see PARAS 56 text and note 16 ante, 66 post.

5 Ibid Sch 1 Pt IV para 1(3) proviso (i). The vesting in the Public Trustee of land by virtue of Sch 1 Pt IV (as amended) did not affect any directions previously given as to the payment of income or of interest on any mortgage money, but until he accepted the trust such instructions could continue to be acted on as if no such vesting had been effected: Sch 1 Pt IV para 1(5).

6 See ibid Sch 1 Pt IV para 1(3) proviso (ii). After the Public Trustee had accepted the trust, no trustee could be appointed in his place without his consent, except by an order of the court: Sch 1 Pt IV para 1(3) proviso (iii).

7 See ibid Sch 1 Pt IV para 1(3) proviso (iv). If, before the Public Trustee had accepted the trust, the persons having power to appoint new trustees were unable or unwilling to make an appointment, or if the tenant for life having power to apply to the court for the appointment of trustees of the settlement neglected to make the application for at least three months after being requested by any person interested in writing to do so, or if the tenants for life of the undivided shares were unable to agree, any person interested under the settlement could apply to the court for the appointment of such trustees: Sch 1 Pt IV para 1(3) proviso (v). As to the county court's jurisdiction under this proviso see Sch 1 Pt IV para 1(3A) (added by the County Courts Act 1984 s 148(1), Sch 2 para 10(b); amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule).

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59. Undivided shares where transitional provisions did not apply.

In any case to which none of the three transitional provisions applied[1], the entirety of the land vested (free from incumbrances affecting undivided shares, or from incumbrances affecting the entirety which were not secured by a legal mortgage[2]) in the Public Trustee upon the statutory trusts[3]. This frequently occurred in practice, but the Public Trustee was not entitled to act in the trust until requested in writing to act by or on behalf of the persons interested in more than an undivided half of the land or the income of such[4]. Until the Public Trustee had been so requested and had accepted, any persons interested[5] in more than an undivided half of the land or the income of it might appoint new trustees in the place of the Public Trustee. The consent of any incumbrancer of undivided shares had to be obtained, but a purchaser was not concerned to see whether such consent had been given. On the appointment of new trustees the land vested in the persons so appointed[6].

1 Ie the provisions of the Law of Property Act 1925 Sch 1 Pt IV para 1(1)-(3) (as amended): see PARAS 56-58 ante.

2 This appears to be the meaning of 'free as aforesaid' used in ibid Sch 1 Pt IV para 1(4).

3 Ibid s 39, Sch 1 Pt IV para 1(4). As to the replacement as from 1 January 1997 of such statutory trusts by trusts of land see PARAS 56 text and note 16 ante, 66 post.

4 See ibid Sch 1 Pt IV para 1(4) proviso (i).

5 It was not necessary that the persons appointing new trustees should be beneficially interested. Thus trustees for sale of an undivided share were 'persons interested' in the land and could concur in the appointment of new trustees, apart from the persons beneficially interested: *Darlington v Darlington* [1926] WN 192; *Re Cliff Contract* [1927] 2 Ch 94; *Re Hayward, Merson v Hayward* [1928] Ch 367.

6 See the Law of Property Act 1925, Sch 1 Pt IV para 1(4) provisos (ii), (iii) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). The statutory power of appointment of new trustees under the Trustee Act 1893 s 10(1) (repealed) required the appointment of 'another person or other persons', and the donee of the power could not appoint himself (*Re Sampson, Sampson v Sampson* [1906] 1 Ch 435); but this could be done under a power not requiring the appointment of 'another' person (*Montefiore v Guedalla* [1903] 2 Ch 723). The Trustee Act 1925 s 36(1) expressly authorises a donee of the power to appoint himself, and consequently any of the 'persons interested' who appoint or concur in appointing trustees of the entirety of the land in the place of the Public Trustee can appoint themselves or one of themselves, and this has commonly been done. If this procedure is not adopted, application can be made by any person interested to the court for the appointment of trustees in the place of the Public Trustee: see the Law of Property Act 1925 Sch 1 Pt IV para 1(4) proviso (iv). As to county courts' jurisdiction under this proviso see Sch 1 Pt IV para 1(4A) (added by the

County Courts Act 1984 s 148(1), Sch 2 para 10(b); amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule).

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60. Undivided shares; shifting of incumbrances.

Under the scheme for vesting in trustees on the statutory trusts land held at law or in equity in undivided shares, incumbrances on undivided shares were in all four cases shifted to the proceeds of sale[1]. Incumbrances on the entirety, if equitable, were also shifted in certain cases[2] to the proceeds of sale, but in other cases[3] they remained charged on the entirety in priority to the statutory trust for sale[4]. Incumbrances on the entirety, if legal, vested in the incumbrancers for legal terms of years, and had priority to the statutory trusts in all cases[5]. In cases where an incumbrance, whether on the entirety or an undivided share, was divested by the transitional provisions and shifted to the proceeds of sale, the trust for sale is not exercisable without the consent of the incumbrancer, if of full age[6], whose incumbrance was divested, but a purchaser is not concerned to see or inquire whether any such consent has been given[7].

1 As to this scheme and the shifting of incumbrances on undivided shares to the proceeds of sale see generally paras 55-59 ante. For the meaning of 'incumbrance' for these purposes see PARA 56 note 4 ante. As to the replacement of the statutory trusts by trusts of land see PARAS 56 text and note 16 ante, 66 post.

2 Ie in cases within the Law of Property Act 1925 Sch 1 Pt IV para 1(1), (3), (4) (as amended): see PARAS 56, 58-59 ante.

3 Ie in cases within ibid Sch 1 Pt IV para 1(2).

4 See ibid Sch 1 Pt IV para 1(8), which provided that Sch 1 Pt IV did not (except where otherwise expressly provided) prejudice incumbrancers whose incumbrances affected the entirety of the land at the commencement of the 1925 Act. It was otherwise expressly provided in Sch 1 Pt IV para 1(1), (3), (4) (as amended) as to equitable incumbrances affecting the entirety, and the entirety vested free from such incumbrances in the statutory trustees. Only Sch 1 Pt IV para 1(2) was within Sch 1 Pt IV para 1(8) as regards equitable incumbrances on the entirety, and the co-owners, on becoming trustees on the statutory trusts, were subject to the equitable incumbrance on the entirety.

5 This vesting was effected by ibid s 39(7), Sch 1 Pt VII for a legal mortgage on the entirety of freehold land and by s 39(8), Sch 1 Pt VIII for a legal mortgage on leasehold land, and Sch 1 Pt IV para 1(8) provides to the same effect. Since it applied to all the cases and in the circumstances within Sch 1 Pt IV para 1(2) equitable incumbrances on the entirety had priority to the statutory trusts, it follows that in these circumstances the statutory trustees took subject to both legal and equitable incumbrances on the entirety, including family charges: *Re Parker's Settled Estates, Parker v Parker* [1928] Ch 247 at 259. Where there was a common mortgage on all the undivided shares, the mortgagees took a term of years subject to redemption by the statutory trustees for sale, and for the purpose of the Law of Property Act 1925 Sch 1 Pt IV (as amended) the mortgage was deemed to be an incumbrance affecting the entirety: see Sch 1 Pt IV para 1(7).

6 As to the attainment of full age see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

7 See the Law of Property Act 1925 Sch 1 Pt IV para 1(9).

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61. Undivided shares falling into possession.

When, after 31 December 1925, settled land is held in trust for persons in undivided shares, the trustees of the settlement may require the estate owner[1] in whom the settled land is vested to vest the land in them by conveyance or assent[2], and the trustees will hold it, subject to incumbrances affecting the settled land which are secured by a legal mortgage, but freed from incumbrances affecting undivided shares or not secured by a legal mortgage, and free from interests under the trust instrument which are prior to the undivided shares, in trust for the persons interested in the land[3]. If the estate owner refuses or neglects to convey the land to the trustees of the settlement, or if for any other reason a conveyance cannot be made without the aid of the court, the court may, on the application of the trustees of the settlement, make an order vesting the settled land in trust for the persons interested in the land[4].

1 For the meaning of 'estate owner' see PARA 47 ante.

2 See the Settled Land Act 1925 s 36(1). This usually happens when a tenant for life dies after 1925, and the land is then held in trust for two or more persons in undivided shares. The land thereupon ceases to be settled land, but it is still 'settled land' for the purposes of s 36(1): see *Re John Thomas deceased* [1939] Ch 513. Thus (if the event took place before 1 January 1997) the statutory trusts were imposed on the land: *Re Cugny's Will Trusts, Smith v Freeman* [1931] 1 Ch 305. Where the land is not settled land when the undivided shares fall into possession, the case is governed by the Law of Property Act 1925 s 39(4) (now as amended), Sch 1 Pt IV para 2, under which also the statutory trusts were imposed; but this case, if it occurs at all, is exceptional. For a possible instance see Wolstenholme and Cherry's Conveyancing Statutes (12th Edn) 626. As to the replacement as from 1 January 1997 of the statutory trusts by trusts of land see PARAS 56 text and note 16 ante, 66 post.

3 Settled Land Act 1925 s 36(2) (s 36(2), (3) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(11)). Thus the trustees will hold the land subject only to any legal mortgage on the entirety of the land; but the trusts override all prior interests and charges arising under the settlement, and all equitable incumbrances affecting the entirety or undivided shares.

4 Settled Land Act 1925 s 36(3) (as amended: see note 3 supra). The estate owner will usually be the personal representative of a deceased tenant for life, but, until he has vested the land in the trustees of the settlement, he holds the land on the same trusts as if it had been so vested: see s 36(1). As to the statutory restrictions on the creation of strict settlements on or after 1 January 1997 see PARA 65 post.

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D. PARTY STRUCTURES AND OPEN SPACES

62. Party walls.

Under the transitional provisions, where, immediately before the commencement of the Law of Property Act 1925[1], a party wall or other party structure was held in undivided shares, ownership was deemed to be severed vertically as between the respective owners, and the owner of each part had such rights to support and of user over the rest of the structure as might be requisite for conferring rights corresponding to those subsisting at the commencement of the 1925 Act[2].

1 Ie 1 January 1926: Law of Property Act 1925 s 209(2) (repealed).

2 Ibid s 39(5), Sch 1 Pt V para 1. For the meaning of 'party wall', and as to the various kinds of party walls which formerly might exist, and the rights of support of the adjoining owners, see BOUNDARIES vol 4(1) (2002 Reissue) PARA 961 et seq.

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63. Open spaces.

Where, immediately before the commencement of the Law of Property Act 1925[1], an open space of land (with or without any building used in common for the purposes of any adjoining land) was held in undivided shares, in right of which each owner had rights of access and user over the open space, the ownership vested in the Public Trustee on the statutory trusts, but these were to be executed only with the leave of the court[2]. Subject to any court order to the contrary[3], each person who would have been a tenant in common has, until the open space has been conveyed to a purchaser, rights of access and user over the open space corresponding to those which would have subsisted if the tenancy in common had remained subsisting[4].

1 Ie 1 January 1926: Law of Property Act 1925 s 209(2) (repealed).

2 Ibid s 39(5), Sch 1 Pt V para 2. As to the replacement as from 1 January 1997 of the statutory trusts by trusts of land see PARAS 56 text and note 16 ante, 66 post. In *Re Bradford City Premises* [1928] Ch 138, the view was taken that the expression 'an open space of land' meant any land that was unbuilt on and included a small yard and ashes-place at the rear of two houses, which, immediately before 1 January 1926, belonged to the owners in undivided shares. Apparently the bracket was accidentally shifted from after 'building' to its present position, but the provision has to be construed as it stands: *Re Bradford City Premises* supra. In *Re Townsend, Townsend v Townsend* [1930] 2 Ch 338, it was, however, held that the Law of Property Act 1925 Sch 1 Pt V para 2 did not apply to a private railway siding which was vested in trustees for persons in undivided shares subject, under a declaration of trust, to rights of access and user in favour of adjoining lessees and other persons, some of whom were beneficially entitled to undivided shares. The siding vested in the trustees on the statutory trusts subject to the rights of access and user.

3 Any person interested may apply to the court for an order declaring the rights and interests under ibid Sch 1 Pt V of the persons interested in any such party structure or open space, or generally may apply in relation to the provisions of Sch 1 Pt V, and the court may make such order as it thinks fit: Sch 1 Pt V para 3.

4 Ibid Sch 1 Pt V para 2.

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(7) THE

64. Position prior to 1 January 1997.

Prior to 1 January 1997[1], equitable interests in land took effect, depending on the interest, either under a settlement under the Settled Land Act 1925[2] or behind a trust for sale. This could be an express trust for sale imposed by the instrument under which the interests were created, or it could be the trust for sale which was one of the statutory trusts imposed in the absence of an express trust for sale[3].

1 The commencement date of the Trusts of Land and Appointment of Trustees Act 1996: see s 27(1); and the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974, art 2.

2 See SETTLEMENTS.

3 Ie imposed by the transitional provisions (see PARAS 55-61 ante), or by the Law of Property Act 1925 s 34 (as amended) or the Settled Land Act 1925 s 36 (as amended) (see PARA 211 post; and SETTLEMENTS). The statutory trusts imposed by the Law of Property Act 1925 were that land be held upon trust to sell it and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs and other outgoings, upon such trusts, and subject to such powers and provisions, as was requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance was not secured by a legal mortgage) interested in the land: s 35 (repealed). Similar trusts were imposed under the Settled Land Act 1925 s 36(6) (now substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(11)).

65. Position on or after 1 January 1997: settlements.

Subject to certain exceptions, no settlement[1] created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925; and no settlement is deemed to be made under that Act on or after that date[2]. No land held on charitable, ecclesiastical or public trusts is, or is deemed to be, settled land[3] on or after 1 January 1997, even if it was deemed to be settled land before that date[4]. Existing settlements under the Settled Land Act 1925 will continue to be so until, at any time after the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on that date, there is no relevant property[5] which is, or is deemed to be, subject to the settlement, whereupon the settlement will permanently cease to be a settlement for the purposes of that Act[6]. Where a settlement ceases to be a settlement for the purposes of the Settled Land Act 1925 because no relevant property is, or is deemed to be, subject to the settlement, any property which is or later becomes subject to the settlement is held in trust for the persons interested under the settlement[7].

The Trusts of Land and Appointment of Trustees Act 1996, except so far as it relates to undivided shares and joint ownership, does not affect or alter the descent, devolution or nature of the estates and interests of or in land for the time being vested in Her Majesty in right of the Crown or of the Duchy of Lancaster, or land for the time being belonging to the Duchy of Cornwall and held in right or respect of the Duchy[8], but subject to that it binds the Crown[9].

1 Ie within the meaning of the Settled Land Act 1925 s 1: Law of Property Act 1925 s 205(1)(xxvi); Trusts of Land and Appointment of Trustees Act 1996 s 23(2). See further SETTLEMENTS.

2 Ibid ss 2(1), 27(2); Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974. This provision does not apply to a settlement created on the occasion of an alteration of any interest in, or of a person becoming entitled under a settlement which (1) is in existence at 1 January 1997; or (2) derives from such a settlement: Trusts of Land and Appointment of Trustees Act 1996 s 2(2). However, a settlement so created will not be a settlement for the purposes of the Settled Land Act 1925 if provision to the effect that it is not is made in the instrument, or any of the instruments, by which it is created: Trusts of Land and Appointment of Trustees Act 1996 s 2(3).

3 Ie land which is the subject of a settlement under the Settled Land Act 1925: s 2; Law of Property Act 1925 s 205(1)(xxvi); Trusts of Land and Appointment of Trustees Act 1996 s 23(2).

4 Trusts of Land and Appointment of Trustees Act 1996 s 2(5). Section 2(5) does not apply in relation to the deed of settlement set out in the Chequers Estate Act 1917 s 1, Schedule (as amended) or the trust instrument

set out in the Chevening Estate Act 1959 s 1, Schedule (as amended): Trusts of Land and Appointment of Trustees Act 1996 s 25(3).

5 'Relevant property' means land and personal chattels to which the Settled Land Act 1925 s 67(1) (heirlooms) applies: Trusts of Land and Appointment of Trustees Act 1996 s 2(4). See further SETTLEMENTS.

6 Ibid s 2(4).

7 Ibid s 2(6), Sch 1 para 6.

8 Ibid s 24(2).

9 Ibid s 24(1).

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66. Position on or after 1 January 1997; trusts of land.

Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, any trust[1] of property which consists of or includes land, apart from land which is settled land[2] or to which the Universities and College Estates Act 1925 applies[3], is a trust of land[4]. By amendments made by the Trusts of Land and Appointment of Trustees Act 1996, all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such implied trusts for sale is now held in trust for the persons interested in the land[5]. In the case of every trust for sale of land created by a disposition there is to be implied, despite any provision to the contrary made by the disposition, a power for the trustees to postpone sale of the land, and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period[6]. The powers and duties of trustees of land[7] are considered elsewhere in this work[8].

Subject to certain exceptions, these provisions bind the Crown[9].

1 'Trust' refers to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and includes a trust created or arising before 1 January 1997: Trusts of Land and Appointment of Trustees Act 1996 ss 1(2), 27(2).

2 For the meaning of 'settled land' see PARA 65 note 3 ante.

3 Trusts of Land and Appointment of Trustees Act 1996 s 1(3).

4 Ibid s 1(1)(a).

5 See ibid s 5, Sch 2 paras 1-6 (amending the Law of Property Act 1925 ss 31, 32, 34, 36; the Administration of Estates Act 1925 s 33; and the Reverter of Sites Act 1987 s 1). See also the Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 7; and PARA 56 text and note 16 ante. The Settled Land Act 1925 does not apply to land held on any trust arising by virtue of the Trusts of Land and Appointment of Trustees Act 1996 Sch 2, so that any such land is subject to a trust of land: s 5(2).

6 Ibid s 4(1). This provision applies to a trust whether it is created, or arises, before, on or after 1 January 1997, but does not affect any liability incurred by trustees before 1 January 1997: s 4(2), (3).

7 'Trustees of land' means trustees of a trust of land: ibid s 1(1)(b).

8 For the general powers of such trustees see ibid ss 6, 8; and TRUSTS vol 48 (2007 Reissue) PARA 1035; for their powers of partition see s 7; para 223 post; and TRUSTS vol 48 (2007 Reissue) PARA 1046; for their power to delegate their functions to beneficiaries of full age and beneficially entitled to an interest in possession in land subject to the trust see s 9; and TRUSTS vol 48 (2007 Reissue) PARA 987; for provisions relating to consultation by

the trustees with the beneficiaries see s 11; and TRUSTS vol 48 (2007 Reissue) PARA 1036; for the right of beneficiaries to occupy the land and restrictions on that right see ss 12, 13; and PARA 68 post.

9 See ibid s 24(1), (2); and PARA 65 text and notes 8-9 ante.

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67. Powers of court in relation to trusts of land.

Any person who is a trustee of land[1] or has an interest in a property subject to a trust of land[2] may make an application to the court[3] for an order[4]. On an application for such an order, the court may make any such order relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit; but may not under this provision make any order as to the appointment or removal of trustees[5].

In determining an application for such an order, the court must have regard, inter alia, to the intentions of the person or persons (if any) who created the trust, the purposes for which the property subject to the trust is held, the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and the interests of any secured creditor of any beneficiary[6]. In the case of any application relating to the exercise in relation to any land of the powers conferred on the trustees to exclude or restrict the right of a beneficiary to occupy land[7], the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land[8]. In the case of any other application, other than one relating to the exercise of the power of the trustees[9] to convey the land to the beneficiaries, the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or, in case of dispute, of the majority according to the value of their combined interests[10]. These provisions[11] do not apply in relation to applications by trustees in bankruptcy[12]. Subject to certain exceptions, however, they bind the Crown[13].

1 For the meaning of 'trustee of land' see PARA 66 note 7 ante.

2 For the meaning of 'trust of land' see PARA 66 ante.

3 Ie the High Court or a county court: Trusts of Land and Appointment of Trustees Act 1996 s 23(3). Where an application under the Law of Property Act 1925 s 30 (repealed) (as to which see further note 11 infra) was made in a matrimonial case in which relief under the Matrimonial Causes Act 1973 ss 23, 24 (as amended) (prospectively substituted by the Family Law Act 1996 s 15, Sch 2, as from a day to be appointed under s 67(3)) was likely to be sought by either party, the appropriate procedure was normally to make the application in the Family Division and join it with an application for any relief required under those provisions: *Williams v Williams* [1976] Ch 278, [1977] 1 All ER 28, CA; *Re Holliday (A Bankrupt), ex p Trustee of the Bankrupt v the Bankrupt* [1981] Ch 405 at 418, [1980] 3 All ER 385 at 393, CA, obiter per Goff LJ (both cases under the Law of Property Act 1925 s 30 (repealed), as to which see further note 11 infra). It was also appropriate to bring cases about the homes of unmarried couples living together in the Family Division: *Bernard v Josephs* [1982] Ch 391 at 401, [1982] 3 All ER 162 at 168, CA, per Lord Denning MR.

4 Trusts of Land and Appointment of Trustees Act 1996 s 14(1).

5 Ibid s 14(2), (3). The powers conferred on the court by s 14 are exercisable on an application whether made before, on or after 1 January 1997: see s 14(4). As to the appointment and removal of trustees at the instance of the beneficiaries see s 19; and TRUSTS vol 48 (2007 Reissue) PARA 845; and as to the appointment

and removal of trustees by the court see TRUSTS vol 48 (2007 Reissue) PARAS 849 et seq, 900 et seq. Section 14 applies in relation to a trust of proceeds of sale of land and trustees of such a trust as in relation to a trust of land and trustees of land: s 17(2). 'Trust of proceeds of sale of land' means any trust of property other than a trust of land which consists of or includes (1) any proceeds of a disposition of land held in trust, including settled land; or (2) any property representing such proceeds; but a trust which, despite s 2 (see PARA 65 ante) is a settlement for the purposes of the Settled Land Act 1925 cannot be a trust of proceeds of sale of land: Trusts of Land and Appointment of Trustees Act 1996 s 17(3), (5). The references in s 17(3) to a trust are to any description of trust, whether express, implied, resulting or constructive, including a trust for sale and a bare trust, and include a trust created, or arising, before 1 January 1997; 'disposition' includes any disposition made, or coming into operation, before that date; and the reference to settled land includes personal chattels to which the Settled Land Act 1925 s 67(1) (heirlooms: see further SETTLEMENTS) applies: Trusts of Land and Appointment of Trustees Act 1996 s 17(4), (6).

Section 14 does not apply to personal representatives: see s 18(1).

6 Ibid s 15(1).

7 Ie under ibid s 13: see PARA 68 post.

8 Ibid s 15(2). As to the right to occupy land see s 12; and PARA 68 post.

9 Ie under ibid s 6(2): see TRUSTS vol 48 (2007 Reissue) PARA 1035.

10 Ibid s 15(3).

11 These provisions replace, in broader form, the powers of the court in relation to a trust for sale conferred by the Law of Property Act 1925 s 30 (repealed). Under s 30 (repealed), if the trustees for sale refused to sell or exercise the powers conferred on them by ss 28, 29 (repealed), or any requisite consent to the exercise of their powers could not be obtained, any person interested could apply to the court for a vesting or other order giving effect to the proposed transaction, or an order directing the trustees to give effect to it, and the court could make such order as it saw fit. The Law Commission, in its report accompanying the draft bill from which the Trusts of Land and Appointment of Trustees Act 1996 is derived, concluded that in the context of applications under the Trusts of Land and Appointment of Trustees Act 1996 s 14 there will be much of value in the body of case law relating to applications under the Law of Property Act 1925 s 30 (repealed): *Transfer of Land: Trusts of Land* (Law Com No 181, June 1989) PARA 12.9.

If asked under the Law of Property Act 1925 s 30 (repealed) to order a sale, the court would look into all the circumstances and consider whether it was right and proper that such an order should be made: *Re Buchanan-Wollaston's Conveyance, Curtis v Buchanan-Wollaston* [1939] Ch 738, [1939] 2 All ER 302, CA. See also *Re Hyde's Conveyance* (1952) 102 L Jo 58. Where a trustee-beneficiary covenanted not to deal with the land except with the consent of a majority of the co-owners, the court refused to order a sale of the land on his application against the wishes of the majority: *Re Buchanan-Wollaston's Conveyance, Curtis v Buchanan-Wollaston* [1939] Ch 738, [1939] 2 All ER 302, CA. If the land was bought for a particular purpose, and that purpose still subsisted, the court would not in general order a sale: *Bedson v Bedson* [1965] 2 QB 666, [1965] 3 All ER 307, CA; *Re Evers' Trust, Papps v Evers* [1980] 3 All ER 399, [1980] 1 WLR 1327, CA; *Dennis v McDonald* [1981] 2 All ER 632, [1981] 1 WLR 810, (varied on another point on appeal: [1982] Fam 63, [1982] 1 All ER 590, CA); *Chhokar v Chhokar* [1984] FLR 313, CA. However, where the purpose had ceased to exist, a sale was ordered: *Jones v Challenger* [1961] 1 QB 176, [1960] 1 All ER 785, CA; *Rawlings v Rawlings* [1964] P 398, [1964] 2 All ER 804, CA; *Jackson v Jackson* [1971] 3 All ER 774, [1971] 1 WLR 1539, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA. As to who was a 'person interested' for the purposes of the Law of Property Act 1925 s 30 (repealed) see *Stevens v Hutchinson* [1953] Ch 299, sub nom *Re No 39 Carr Lane, Acomb, Stevens v Hutchinson* [1953] 1 All ER 699; *Levermore v Levermore* [1980] 1 All ER 1, [1979] 1 WLR 1277; *Midland Bank plc v Pike* [1988] 2 All ER 434; *Halifax Mortgage Services v Muirhead* (4 December 1997, unreported), CA. A mortgagee was not prevented from applying for an order for sale under the Law of Property Act 1925 s 30 (repealed), nor was the court deprived of the power to make such an order if in the exercise of its discretion it considered it right to do so, by the existence of an occupant of the property having rights which were binding on the mortgagee by reason of the Land Registration Act 1925 s 70(1)(g) (overriding interests: see LAND REGISTRATION): *Halifax Mortgage Services v Muirhead* supra; *Bank of Baroda v Dhillon* [1998] FCR 489, [1998] Fam Law 138, CA.

12 Trusts of Land and Appointment of Trustees Act 1996 s 15(4). As to such applications see the Insolvency Act 1986 s 335A (added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 23 and replacing the relevant parts of the Insolvency Act 1986 s 336(3),(4)); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

In applications under the Law of Property Act 1925 s 30 (repealed), outside or prior to the enactment of the Insolvency Act 1986 s 336 (as amended), where one of the co-owners had become bankrupt, the court generally ordered a sale within a short period at the behest of the trustee in bankruptcy (see *Re Solomon (A Bankrupt), ex p Trustee of the Property of the Bankrupt v Solomon* [1967] Ch 573, sub nom *Re A Debtor, ex p Trustee v Solomon* [1966] 3 All ER 255; *Re Turner (A Bankrupt), ex p Trustee of the Bankrupt v Turner* [1975] 1

All ER 5, [1974] 1 WLR 1556; *Re Densham (A Bankrupt), ex p Trustee of the Bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Gorman (A Bankrupt)* [1990] 1 All ER 717, [1990] 1 WLR 616, DC), but this was not invariably the case (see *Re Holliday (A Bankrupt), ex p Trustee of the Bankrupt v the Bankrupt* [1981] Ch 405, [1980] 3 All ER 385, CA). For the voice of the trustee not to prevail, the circumstances needed to be 'special' or 'exceptional': *Re Citro (A Bankrupt)* [1991] Ch 142, [1990] 3 All ER 952, CA; *Re Lowrie (A Bankrupt), ex p Trustee of the Bankrupt v the Bankrupt* [1981] 3 All ER 353, DC. However, this principle only applied when the collateral or secondary purpose of the trust had come to an end: *Abbey National plc v Moss* (1994) 26 HLR 249, CA. No distinction in principle was made between the case of a trustee in bankruptcy and that of a chargee: *Lloyds Bank plc v Byrne and Byrne* [1993] 1 FLR 369, CA; *Barclays Bank plc v Hendricks* [1996] 1 FLR 258; *Bankers Trust Co v Namdar* (17 February 1997, unreported), CA. As to the length of the moratorium period granted when ordering a sale at the behest of a trustee in bankruptcy or chargee see *Barclays Bank plc v Hendricks* supra.

13 See the Trusts of Land and Appointment of Trustees Act 1996 s 24(1), (2); and PARA 65 text and notes 8-9 ante.

UPDATE

67 Powers of court in relation to trusts of land

NOTE 3--Matrimonial Causes Act 1973 s 24 (as originally enacted) amended: Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 3 (amendment subject to transitional provision: see s 85(4)).

NOTE 11--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

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68. Right of beneficiaries to occupy trust land.

A beneficiary[1] who is beneficially entitled[2] to an interest in possession[3] in land subject to a trust of land[4] is entitled by reason of his interest to occupy the land at any time if at that time the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or the land is held by the trustees so as to be so available[5]. This provision does not, however, confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him[6].

Where two or more beneficiaries are, or would otherwise be, so entitled to occupy land, the trustees of land[7] may exclude or restrict the entitlement of any one or more (but not all) of them[8]; but trustees may not unreasonably exclude any beneficiary's entitlement to occupy land, or restrict any such entitlement to an unreasonable extent[9].

The trustees of land may from time to time impose reasonable conditions[10] on any beneficiary in relation to his occupation of land by reason of his statutory entitlement[11].

The matters to which trustees are to have regard in exercising the powers so conferred include:

47 (1) the intentions of the person or persons (if any) who created the trust;
48 (2) the purposes for which the land is held; and
49 (3) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land[12].

The powers so conferred on trustees may not be exercised so as prevent any person who is in occupation of land (whether or not by reason of a statutory entitlement[13]) from continuing to occupy the land, or in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court[14] has given approval[15]; and the matters to which the court is to have regard in determining whether to give approval include the matters mentioned in heads (1) to (3) above[16].

These provisions relating to trustees apply to personal representatives with appropriate modifications[17] and without prejudice to the functions of personal representatives for the purposes of administration[18]. Subject to certain exceptions, they also bind the Crown[19].

1 'Beneficiary', in relation to a trust, means any person who under the trust has an interest in property subject to the trust, including a person who has such an interest as a trustee or a personal representative: Trusts of Land and Appointment of Trustees Act 1996 s 22(1).

2 References to a beneficiary who is beneficially entitled do not include a beneficiary who has an interest in property subject to the trust only by reason of being a trustee or personal representative: ibid s 22(2).

3 For these purposes, a person who is a beneficiary only by reason of being an annuitant is not to be regarded as entitled to an interest in possession in land subject to the trust: ibid s 22(3).

4 For the meaning of 'trust of land' see PARA 66 ante.

5 Trusts of Land and Appointment of Trustees Act 1996 s 12(1).

6 Ibid s 12(2).

7 For the meaning of 'trustees of land' see PARA 66 note 7 ante.

8 Trusts of Land and Appointment of Trustees Act 1996 ss 12(3), 13(1).

9 Ibid s 13(2).

10 The conditions which may be imposed on a beneficiary include, in particular, conditions requiring him (1) to pay any outgoings or expenses in respect of the land; or (2) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there: ibid s 13(5). Where the entitlement of any beneficiary to occupy land under s 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary include, in particular, conditions requiring him to: (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted; or (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary: s 13(6).

11 Ibid s 13(3).

12 Ibid s 13(4).

13 Ie under ibid s 12.

14 Ie the High Court or a county court: ibid s 23(3). As to the powers of the court see also PARA 67 ante.

15 Ibid s 13(7).

16 Ibid s 13(8).

17 The appropriate modifications include the substitution of references to persons interested in the due administration of the estate for references to beneficiaries, and the substitution of references to the will for references to the disposition creating the trust: ibid s 18(2).

18 Ibid s 18(1). As to the functions of personal representatives see generally EXECUTORS AND ADMINISTRATORS.

19 See ibid s 24(1), (2); and PARA 65 text and notes 8-9 ante.

UPDATE

68 Right of beneficiaries to occupy trust land

NOTE 10--See *Re Barcham* [2008] EWHC 1505 (Ch), [2009] 1 All ER 145; and TRUSTS vol 48 (2007 Reissue) PARA 739.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(7) THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996/69. Power to make consequential provision.

69. Power to make consequential provision.

The Lord Chancellor may by order made by statutory instrument[1] make any such supplementary, transitional or incidental provision as appears to him to be appropriate for any of the purposes of the Trusts of Land and Appointment of Trustees Act 1996 or in consequence of any of the provisions of that Act[2]. Such an order may, in particular, include provision modifying any enactment contained in a public general or local Act which was passed before, or in the same session as, that Act[3].

1 A statutory instrument made in the exercise of the power so conferred is subject to annulment in pursuance of a resolution of either House of Parliament: Trusts of Land and Appointment of Trustees Act 1996 s 26(3).

2 Ibid s 26(1).

3 Ibid s 26(2).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(8) STATUTORY RESTRICTION OF PROPRIETARY RIGHTS/70. Proprietary rights at common law.

(8) STATUTORY RESTRICTION OF PROPRIETARY RIGHTS

70. Proprietary rights at common law.

At common law the rights of a landowner were circumscribed in three respects. First, the duration of his interest depended on the estate vested in him[1]; until his estate determined, either naturally or by forfeiture[2], escheat[3] or adverse possession[4], he could not be deprived of his land against his will. Secondly, his right to use or enjoy his land in any way he pleased was limited only by the obligation not to interfere with the use or enjoyment of adjoining land in such a way as to cause a nuisance[5], by rights over his land vested in other persons[6] or in the general public[7], and, in the case of a life estate or a term of years, by the conditions on which his estate was granted and by the doctrine of waste[8]. Thirdly, if he granted a lease of his land or a licence to occupy it, the terms on which the tenant held the land or the licensee occupied it were a matter solely for agreement between the parties[9]. In each of these respects the landowner's rights have been restricted by statute.

1 As to the duration of an estate in fee simple see PARA 92 post; as to an estate tail see PARA 117 et seq post; and as to a life estate see PARA 144 et seq post. As to a term of years see PARA 100 et seq post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 As to determination by forfeiture see PARA 253 post.

3 As to determination by escheat see PARA 254 post.

4 As to determination by adverse possession see PARA 258 post.

5 As to nuisances between neighbouring properties see NUISANCE vol 78 (2010) PARA 116 et seq.

6 As to rights of common see COMMONS vol 13 (2009) PARAS 405, 431 et seq; as to easements and profits à prendre see EASEMENTS AND PROFITS A PRENDRE; as to restrictive covenants see EQUITY vol 16(2) (Reissue) PARA 613 et seq; as to mortgages see MORTGAGE vol 77 (2010) PARA 101 et seq; and as to rentcharges see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

7 As to public rights see EASEMENTS AND PROFITS A PRENDRE; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 197 et seq.

8 As to waste see PARA 149 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 431 et seq.

9 As to leases and licences see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 1 et seq, 9 et seq respectively.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(8) STATUTORY RESTRICTION OF PROPRIETARY RIGHTS/71. Compulsory acquisition.

71. Compulsory acquisition.

Numerous statutes have authorised the taking of land or of an interest in land without the agreement of the owner[1], generally for public purposes, such as the use of the armed forces[2] or government departments[3], the purposes of local authorities[4], or the provision of transport facilities[5] or other public services[6]. In some cases the statute, generally a private or local Act, authorises the compulsory purchase of specific land[7]. In others the statute, generally a public general Act, authorises the taking of land for particular purposes without specifying the land, and provides for further authorisation procedure after the land required for the particular purpose has been identified[8]. Some statutes authorise the taking of land for an estate less than the fee simple, as in the case of the compulsory hiring of land for agricultural purposes[9] or a compulsory rights order made by the Coal Authority[10]. Others authorise the taking of a horizontal stratum of the land, as in the case of the statutory vesting in the highway authority of the surface of a highway maintainable at the public expense[11], or as in the case of a power to take subsoil for the purpose of constructing a tunnel[12], or of some right or interest in the land, as in the case of a power to create easements[13], or the taking of possession only without the acquisition of any estate or interest in the land apart from the possession, as in the case of a power of requisitioning[14]. In most cases the statute gives the landowner a right to compensation, but he is not entitled to compensation unless he can establish a statutory right[15]. Where the land is subject to a mortgage, a rentcharge or a lease, the apportionment of the compensation between the various persons interested is governed by special statutory provisions[16].

1 As to compulsory acquisition see generally COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 501 et seq.

2 See ARMED FORCES.

3 See eg COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 519, 572 et seq; OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 634.

4 See eg OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 633; and see generally TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 28 et seq.

5 See eg AIR LAW vol 2 (2008) PARA 186 et seq; HIGHWAYS, STREETS AND BRIDGES.

6 See eg FUEL AND ENERGY vol 19(2) (2007 Reissue) PARAS 998, 1282 et seq; WATER AND WATERWAYS vol 101 (2009) PARA 453.

7 As to acquisition under a local Act see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 504.

8 As to acquisition under a public general Act see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 505.

9 As to the compulsory hiring of land for agricultural purposes see AGRICULTURAL LAND vol 1 (2008) PARA 534 et seq.

10 As to compulsory rights orders see the Opencast Coal Act 1958 s 4 (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 422 et seq.

11 As to statutory vesting in highway authorities see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 225 et seq.

12 *Metropolitan Rly Co v Fowler* [1893] AC 416, HL; *Farmer v Waterloo and City Rly Co* [1895] 1 Ch 527.

13 As to powers to create easements see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 502; EASEMENTS AND PROFITS A PRENDRE.

14 As to powers of requisitioning see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 508 et seq.

15 As to powers to purchase or to take for use see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 521.

16 As to these special statutory provisions see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 698 et seq.

72. Restrictions on freedom of enjoyment.

The freedom of the landowner to develop and use his land as he pleases has been progressively subjected to control by local authorities[1]. The general principle of the system of planning control is that no development may be carried out unless permission has first been obtained from the local planning authority, or from the Secretary of State on appeal[2]. The carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land, constitutes development[3], but for certain classes of development as so defined permission is conferred by general order and the permission of the local planning authority is not needed[4]. The landowner has no general right to compensation if he is refused permission to develop his land, but in some circumstances compensation is payable, and in certain cases the local planning authority may be compelled to purchase the land if planning permission is refused[5].

In addition to the general system of control of development, local authorities may make orders (referred to as 'tree preservation orders') for the preservation of specific trees and woodlands in the interests of amenity, under which the cutting of trees may be prohibited[6]; and the demolition, alteration or extension of buildings of special architectural or historic interest is restricted[7]. Further controls exist as to ancient monuments scheduled as such by the Secretary of State and designated areas of archaeological importance[8].

Local authorities also have wide powers to enforce building regulations made by the Secretary of State[9] with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings for the purposes of securing the public health and safety[10], furthering the conservation of fuel and power and preventing waste, undue

consumption, misuse or contamination of water[11]; to regulate the deposit, treatment and disposal of waste in or on land[12]; to deal with matters which constitute statutory nuisances[13]; and to ensure that houses are fit for human habitation and free from overcrowding[14].

In addition, there are statutory provisions regulating the abstraction of underground water[15].

1 The first statute of general application was the Housing, Town Planning etc Act 1909 (repealed). The present powers of local planning authorities are contained principally in the Town and Country Planning Act 1990: see generally TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 28 et seq. For legislation relating to building lines see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 497 et seq, and for legislation relating to the Green Belt round London see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 938 et seq.

2 See generally the Town and Country Planning Act 1990 ss 57(1), 77 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 236 et seq, 483.

3 See ibid s 55(1); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 218 et seq.

4 See the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, art 3, Sch 2 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 255.

5 As to when a local authority may be compelled to purchase the land if planning permission is refused see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 966 et seq.

6 See the Town and Country Planning Act 1990 s 198 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 850 et seq.

7 See, generally, the Planning (Listed Buildings and Conservation Areas) Act 1990; and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1072 et seq.

8 See, generally, the Ancient Monuments and Archaeological Areas Act 1979; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1002 et seq.

9 See, generally, the Building Act 1984; and BUILDING.

10 Ibid s 1(1)(a). The statutory words are 'securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings'.

11 Ibid s 1(1)(b), (c).

12 See the Environmental Protection Act 1990 Pt II (ss 29-78) (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH.

13 See ibid Pt III (ss 79-84) (as amended); and NUISANCE vol 78 (2010) PARAS 115, 155-172, 225-226; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH.

14 As to fitness for human habitation and overcrowding see generally HOUSING vol 22 (2006 Reissue) PARA 443 et seq.

15 See the Water Resources Act 1991 Pt II Ch II (ss 24-72) (as amended); and WATER AND WATERWAYS vol 100 (2009) PARA 214 et seq.

UPDATE

72 Restrictions on freedom of enjoyment

NOTES-- Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/1. HISTORICAL BACKGROUND; EVOLUTION OF THE LAW OF PROPERTY IN LAND/(8) STATUTORY RESTRICTION OF PROPRIETARY RIGHTS/73. Limitation of landlord's rights.

73. Limitation of landlord's rights.

A landlord's common law rights as against his tenant have in many cases been restricted by statute. The restrictions take two main forms, namely restriction of the landlord's right to possession and the control of rent. Different types of property are affected by widely differing systems of control, and some tenancies remain free from any form of control[1]. There are three main classes of property in respect of which such common law rights have been restricted by statute[2], namely (1) dwelling houses[3]; (2) premises occupied for the purposes of a business[4]; and (3) agricultural land[5]. In some cases the restrictions apply to licences to occupy land as well as to tenancies[6].

In addition to the general system of control, the express terms of a lease or tenancy may be varied by statute[7].

1 See eg LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 708, 1023 et seq (exclusion from the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) and from the Housing Act 1988 respectively).

2 As to conditions attached to dwelling houses provided or improved with the assistance of an improvement grant see generally HOUSING vol 22 (2006 Reissue) PARA 625 et seq.

3 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 808 et seq, vol 27(3) (2006 Reissue) PARA 1389 et seq.

4 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 701 et seq.

5 See AGRICULTURAL LAND vol 1 (2008) PARA 301 et seq.

6 See eg AGRICULTURAL LAND vol 1 (2008) PARA 327.

7 See eg LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 147 et seq (power to vary leases), 416 et seq (implied undertaking to repair), 481 et seq (modification of covenants restricting alienation without licence or consent), and 498 (modification of covenants restricting the alteration of user without licence or consent).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(i) Definitions/74. In general.

2. LAND AND INTERESTS IN LAND

(1) CORPOREAL AND INCORPOREAL RIGHTS

(i) Definitions

74. In general.

Strictly the term 'corporeal' applies to the land itself, whereas rights in the land are incorporeal[1]; but this is not in accordance with legal usage, and a right in the land, if accompanied by possession, is regarded as corporeal, whereas partial rights which do not entitle the owner of them to possession are regarded as incorporeal[2]. Rights in land, whether corporeal or incorporeal, are described by the words 'tenements' and 'hereditaments',

'tenements' meaning primarily that they are the subjects of tenure, although the word is not thus restricted, and 'hereditaments' meaning that they were, while rules of inheritance were in force[3], capable of passing to the heir. 'Tenements' and 'hereditaments' are not the same in scope, and 'land' is not always restricted to land in the physical sense; it may extend to rights in the land[4]. 'Lands, tenements and hereditaments'[5] comprises both real estate and chattels real; thus although it does not include personal chattels, it formerly comprised copyholds[6], and it comprises chattels real[7] as well as freeholds.

1 As to this distinction see generally para 1 note 1 ante.

2 See Williams on the Law of Real Property (24th Edn) 89, 393; Challis's Law of Real Property (3rd Edn) 44; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 141 et seq.

3 Ie until 1926: see PARA 96 post.

4 As to the term 'land' extending to rights in the land see PARA 77 post.

5 Eg in the Statute of Frauds (1677) s 4 (repealed as regards the sale of land, and replaced by the Law of Property Act (Miscellaneous Provisions) Act 1989 s 2 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4), but without reproducing the words 'tenements and hereditaments').

6 *Withers v Withers* (1752) Amb 151. However, it seems that copyholds are only included in the expression if the lord's rights would not be prejudiced: *Doe d Tunstill v Bottriell* (1833) 5 B & Ad 131.

7 See *Forster v Hale* (1798) 3 Ves 696; affd (1800) 5 Ves 308.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(i) Definitions/75. Meaning of 'tenure'.

75. Meaning of 'tenure'.

'Tenure' denotes the holding of land by a tenant under his lord, and is only appropriate where the feudal relation of lord and tenant can exist[1]. Thus, the subject matter of tenure is primarily land in the physical sense[2]. Where by subinfeudation, prior to the Statute Quia Emptores[3], the tenant became a mesne lord, he retained the seigniory of the land, and this became, as between him and his lord, the subject of tenure in lieu of the land[4]. The seigniory was usually identical with the lordship of a manor, and when it existed over a number of manors was known as a 'land barony' or 'honour'[5]. Thus tenure exists in land, seigniories and territorial honours, but other incorporeal interests in land, such as rentcharges and easements, although they may fall within the extended meaning which has been given to tenements[6], are not the subject matter of tenure[7].

1 See Co Litt 1a; *A-G of Ontario v Mercer* (1883) 8 App Cas 767 at 772, PC; and PARA 4 ante.

2 Where a statute refers to 'property of whatsoever nature, tenure or kind', the word 'tenure' shows that realty is included: *Wilson v Hood* (1864) 3 H & C 148, which was decided on the Solicitors Act 1860 s 28 (repealed and reproduced, but without mention of 'tenure', in the Solicitors Act 1974 s 73).

3 Ie 18 Edw 1 (Quia Emptores) (1289-90). See generally para 7 ante.

4 As to subinfeudation see generally para 7 ante.

5 See Madox's Baronia Anglica (1741) 5 et seq. A barony in this sense is annexed to the land. As to titles of honour see PEERAGES AND DIGNITIES vol 79 (2008) PARA 801 et seq.

6 As to tenements see PARA 78 post.

7 See Co Litt 19b, 20a. Thus, apart from the Intestates Estates Act 1884 s 4 (repealed as to deaths occurring after 1925 by the Administration of Estates Act 1925 s 56, Sch 2 Pt I), such incorporeal interests were not subject to escheat, which was incident only to tenure: see Challis's Law of Real Property (3rd Edn) 38 et seq. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

76. General meaning of 'land'.

The term 'land', in its legal signification, includes any ground, soil or earth, such as meadows, pastures, woods, moors, waters, marshes and heath; houses and other buildings upon it; the air space above it[1]; and all mines and minerals beneath it[2]. It also includes anything fixed to the land[3], as well as growing trees[4] and crops, except those which, broadly speaking, are produced in the year by the labour of the year[5]. A grant of all the profits of land passes the whole land, herbage, trees, mines and whatever is parcel of the land, but a grant of a particular profit of or right in the land does not extend beyond such profit or right[6]. For the purposes of ownership, land may be divided horizontally, vertically or otherwise[7], and either below or above the ground. Thus separate ownership may exist in strata of minerals[8], in the space occupied by a tunnel[9], or in different storeys of a building[10].

1 As to invasion of air space above the land, a distinction is drawn between structures standing on the land of a neighbour and overflying aircraft, balloons, bullets or missiles: *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* [1987] 2 EGLR 173 at 175-176 per Scott J. Despite earlier controversy as to whether invasion of air space gives rise to a cause of action in trespass or only in nuisance, in which case damage is required to be proved, it now appears that any invasion by a structure standing on the land of a neighbour is a trespass: *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* supra; *Wandsworth District Board of Works v United Telephone Co* (1884) 13 QBD 904, CA (obiter); *Gifford v Dent* [1926] WN 336; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343; *Ward v Gold* (1969) 211 Estates Gazette 155. Cf *Pickering v Rudd* (1815) 4 Camp 219, but see *Kenyon v Hart* (1865) 6 B & S 249 at 252 per Blackburn J arguendo. Otherwise, the rights of an owner in the air space above his land are restricted to such a height as is necessary for the ordinary use and enjoyment of that land: *Berstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479, [1977] 2 All ER 902. It would seem that the cause of action for infringement of those rights would also be in trespass: *Berstein of Leigh (Baron) v Skyviews & General Ltd* supra, but cf *Clifton v Viscount Bury* (1887) 4 TLR 8. As to the grant of an injunction to restrain infringement see CIVIL PROCEDURE vol 11 (2009) PARA 442. As to entry by aircraft see AIR LAW vol 2 (2008) PARAS 653-656 (statutory protection from liability for trespass and nuisance), 657-658 (common law position). See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 24, 411; NUISANCE vol 78 (2010) PARA 139; TORT.

2 Co Litt 4a; 2 Bl Com (14th Edn) 18. 'Land' appears to have been originally restricted to arable land: Co Litt 4a; Shep Touch (8th Edn) 91; 2 Pollock and Maitland's History of English Law 147. The extent of its legal signification has usually been expressed in the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* (to whom belongs the soil, his it is, even to heaven and to the middle of the earth). A conveyance of land prima facie includes everything directly beneath the surface of the land conveyed and the space directly above: *Laybourn v Gridley* [1892] 2 Ch 53; *Corbett v Hill* (1870) LR 9 Eq 671; *Wandsworth District Board of Works v United Telephone Co* (1884) 13 QBD 904 at 915, CA, obiter per Brett MR and at 919 per Bowen LJ; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343 (air space above); *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA; *Straudley Investments Ltd v Barpress Ltd* [1987] 1 EGLR 69 at 70, CA, per Nicholas LJ (air space above); *Davies v Yadegar* [1990] 1 EGLR 71, CA (air space above); *Haines v Florensa* [1990] 1 EGLR 73, CA (air space above). For a critique of the *'cujus est solum'* maxim see *Railways Comr v Valuer-General* [1974] AC 328 at 351, [1973] 3 All ER 268 at 277, PC. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 17, 161.

3 On the question whether a chattel has been so affixed to the land as to become part of it see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 173 et seq. As to building materials see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 84.

4 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 187-194.

5 As to the distinction between fructus naturales and fructus industriales, and also between the sale of growing crops and the sale of severed crops, see AGRICULTURAL LAND vol 1 (2008) PARAS 370-371. As to emblements see AGRICULTURAL LAND vol 1 (2008) PARA 369; EXECUTORS AND ADMINISTRATORS.

6 Co Litt 4b; *Anon* (undated) Keil 118; *Bishop of Oxford's Case* (1621) Palm 174.

7 See the Trustee Act 1925 s 12(2); the Law of Property Act 1925 s 205(1)(ix) (respectively amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (2), Sch 3 para 3(1), (2), Sch 4); and *Railways Comr v Valuer-General* [1974] AC 328, [1973] 3 All ER 268, PC. Cf *Re Metropolitan District Rly Co and Cosh* (1880) 13 ChD 607, CA (power to dispose of land under the Lands Clauses Consolidation Act 1845 s 127 did not extend to a horizontal stratum).

8 See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 20 et seq. All gold, silver and petroleum is vested in the Crown: see CROWN PROPERTY; FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1634. Coal and certain other minerals formerly vested in the British Coal Corporation were vested in the Coal Authority and are now mainly vested in the successor companies: see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 67 et seq.

9 See *Bevan v London Portland Cement Co Ltd* (1892) 67 LT 615; *Metropolitan Rly Co v Fowler* [1893] AC 416, HL. The grant of the exclusive use of pipes or wires is, however, an easement (see eg *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269) as, apparently, is the grant of the exclusive use of a burial vault (see eg *Bryan v Whistler* (1828) 8 B & C 288).

10 *Doe d Freeland v Burt* (1787) 1 Term Rep 701; *Corbett v Hill* (1870) LR 9 Eq 671. Whether a room projecting over neighbouring premises carries ownership of the column of air above depends on the circumstances: *Corbett v Hill* supra. The conveyance of a dwelling house may pass the footings and eaves, where they extend beyond the surface boundary, but not the column of air between them: *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA.

77. Statutory definitions of 'land'.

The meaning of 'land' may be extended for the purpose of a particular instrument when this is required by the context[1], and it is extended for the purpose of statutes. In statutes generally, passed after 1850 and before 1 January 1979, 'land' includes messuages, tenements and hereditaments, houses and buildings of any tenure[2]. In statutes generally, passed on and after 1 January 1979, 'land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land[3]. In the Lands Clauses Consolidation Act 1845[4] it includes messuages, lands, tenements, and hereditaments of any tenure; in the Law of Property Act 1925 it includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way), and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over or derived from land[5]. Where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property[6]. Thus, under statutory definitions, the word 'land' is usually extended to include not only land in the physical sense, with all that is above it or underneath it, but also all rights in the land and a right to share in the proceeds of sale of land under a trust for sale[7].

1 As to such extensions of meaning generally see DEEDS AND OTHER INSTRUMENTS.

2 Interpretation Act 1978 s 22(1), Sch 2 para 5(b).

3 Ibid ss 5, 22(1), Sch 1, Sch 2 para 4(1)(a). This definition is wide enough to include a party wall deemed by the Law of Property Act 1925 s 38 to be divided vertically: *Dean v Walker* (1997) 73 P & CR 366, CA. 'A way over any land' in the Highways Act 1980 s 31 (as amended) (re-enacting with amendments the Rights of Way Act 1932 s 1 (repealed)) does not include a public right of navigation over a non-tidal navigable river or other waterway: *A-G, ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 425, [1992] 1 All ER 230, HL.

4 Ie the Lands Clauses Consolidation Act 1845 s 3. See also COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 511.

5 Law of Property Act 1925 s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). This definition is applied by the Administration of Estates Act 1925 s 55(1)(via) (added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 6(1), (5)). 'Mines and minerals' include any strata or seam of minerals in or under any land, and powers of working and getting the same: Law of Property Act 1925 s 205(1)(ix) (as so amended). See the corresponding definitions in the Settled Land Act 1925 s 117(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(13)), and the Trustee Act 1925 s 68(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4). See also SETTLEMENTS; TRUSTS.

6 Trusts of Land and Appointment of Trustees Act 1996 s 3(1). Similarly, where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land: s 3(1). These provisions do not apply in the case of a trust created by a will where the testator died before 1 January 1997, but subject to that, they apply to a trust whether it is created, or arises, before, on or after that date: see ss 3(2), (3), 25(5), 27(2); and the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974. As to the general replacement of statutory trusts for sale with trusts of land see PARA 66 ante.

7 Under the doctrine of conversion, as it existed prior to the enactment of the Trusts of Land and Appointment of Trustees Act 1996 s 3 (see note 6 supra), where land was held on trust for sale, the interests of the beneficiaries were deemed to be interests in the proceeds of sale, even before the land had been sold: *Irani Finance Ltd v Singh* [1971] Ch 59, [1969] 3 All ER 1455 (affd [1971] Ch 59, [1970] 3 All ER 199, CA) (Administration of Justice Act 1956 s 35(1) (repealed)); *Stevens v Hutchinson* [1953] Ch 299, sub nom *Re No 39 Carr Lane, Acomb: Stevens v Hutchinson* [1953] 1 All ER 699 (Law of Property Act 1925 s 195(1) (repealed)); *Perry v Phoenix Assurance plc* [1988] 3 All ER 60, [1988] 1 WLR 940 (Charging Orders Act 1979 s 3(2), Land Charges Act 1972 s 6(1) (as amended)); cf *Harman v Glencross* [1985] Fam 49, [1986] 1 All ER 545, CA (Charging Orders Act 1979 s 3(5)). As to the doctrine of conversion see EQUITY vol 16(2) (Reissue) PARA 701 et seq. However, in many cases the phrase 'interest in land' was held to include a share in the proceeds of sale of land held on trust for sale: *Cooper v Critchley* [1955] Ch 431, [1955] 1 All ER 520, CA (Law of Property Act 1925 s 40 (repealed)); *Elias v Mitchell* [1972] Ch 652, [1972] 2 All ER 153 (Land Registration Act 1925 s 54 (as amended)); *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL (Land Registration Act 1925 s 70 (as amended)). Similar interests have been held to be interests in land for the purposes of other enactments: see *Kirkland v Peatfield* [1903] 1 KB 756; *Re Hazeldine's Trusts* [1908] 1 Ch 34, CA; *Re Fox, Brooks v Marston* [1913] 2 Ch 75; *Re Witham, Chadburn v Winfield* [1922] 2 Ch 413; *Re Jauncey, Bird v Arnold* [1926] Ch 471 (decisions under the Real Property Limitation Act 1833 (repealed), and the Real Property Limitation Act 1874 (repealed)).

An option to purchase a leasehold interest is an interest in land within the Law of Property Act 1925 s 56(1) (*Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59); but a right of pre-emption is not an interest in land for the purposes of the general law (*Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA). For the meaning of 'agricultural land' under the Inheritance Tax Act 1984 see *Starke v IRC* [1996] 1 All ER 622, [1995] 1 WLR 1439, CA. Growing crops may be an interest in land (see AGRICULTURAL LAND vol 1 (2008) PARA 371), as are agreements for leases (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 77). A secure tenant's right to buy is not, however, an interest in land: see PARA 46 text and note 7 ante. As to licences to occupy land see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 9 et seq. As to boundary agreements see BOUNDARIES vol 4(1) (2002 Reissue) PARA 903; and as to actions on debentures containing a charge on land see COMPANIES vol 15 (2009) PARA 1312.

UPDATE

77 Statutory definitions of 'land'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

78. Meaning of 'tenement'.

The word 'tenement' is not restricted to lands and other matters which are the subject of tenure. Everything in which a person can have an estate of freehold[1], and which is connected with land or savours of the realty[2], is a tenement. Thus the word includes not only land, as the corporeal subject formerly of inheritance, but also all rights which before 1926 would have been heritable issuing out of land, or concerning, or annexed to, or exercisable over, land, although they do not lie in tenure, such as rents, commons and other profits à prendre and (formerly) tithes[3], and offices or dignities which descend to heirs, whether they relate to land or not[4].

In popular language 'tenement' means a house or part of a house[5] capable of separate occupation, and is sometimes so used in statutes[6]; and, where the language or the purpose of the statute so requires, the expression is restricted to property capable of visible and physical occupation, and does not include incorporeal rights[7].

1 'Tenement' is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits à prendre out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised ut de libero tenemento': Co Litt 6a. Since offices, rents, commons, profits à prendre and the like are not the subject of tenure, it is clear that in speaking of 'frank tenement' Coke referred to the freehold interest of which they were capable. In 2 Bl Com (14th Edn) 17 permanent incorporeal rights are treated as tenements, because they can be 'holden'; and this is adopted in *Earl of Beauchamp v Winn* (1873) LR 6 HL 223 at 241. Here, however, by 'holden' must be understood that the right is actually possessed or enjoyed, not that it is held of a lord in the feudal sense. The technical meaning of 'tenement' is not restricted by capacity for being the subject of tenure. This is clear from Coke's definition. To constitute a right a tenement it is sufficient that it should savour of (that is, be incident to) land: see Challis's Law of Real Property (3rd Edn) 43. As to the inclusion of incorporeal rights as tenements, although not 'holden', see 2 Pollock and Maitland's History of English Law (2nd Edn) 147.

2 See Co Litt 20a.

3 Co Litt 19b, 20a; *Martyn v Williams* (1857) 1 H & N 817 at 827. A way-leave (*Lord Hastings v North Eastern Rly Co* [1898] 2 Ch 674 at 678; affd [1899] 1 Ch 656, CA; on appeal sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL), a rabbit warren (*R v Piddletrenthide Inhabitants* (1790) 3 Term Rep 772; *Earl of Beauchamp v Winn* (1873) LR 6 HL 223), a several fishery (*Redington v Millar* (1888) 24 LR Ir 65, Ir CA), and other profits à prendre (*Muskett v Hill* (1839) 5 Bing NC 694; *Martyn v Williams* supra), and (formerly) tithes (*R v Skingle* (1718) 1 Stra 100; *R v Ellis* (1816) 3 Price 323) are within the meaning of the word 'tenement' unless excluded by the context (*R v Nevill* (1846) 8 QB 452). A coal duty levied under a local Act might be a tenement: *A-G v Black* (1871) LR 6 Exch 78 at 82, 85. 13 Edw 1 (Statute of Westminster the Second) (1285) c 1, commonly called the Statute de Donis Conditionalibus, which created estates tail (see PARA 117 post), refers only to tenements, and the extension of the term was perhaps due to the desire to make all heritable rights entailable under the statute. A rentcharge was a tenement within 8 Hen 6 c 7 (Electors of Knights of the Shires) (1429) (repealed), relating to parliamentary franchise: *Dodds v Thompson* (1865) LR 1 CP 133; *Dawson v Robins* (1876) 2 CPD 38. See also *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940 (coal duties granted by statute). Tithe was converted into tithe rentcharge by the Tithe Act 1836 and was abolished by the Tithe Act 1936, a redemption annuity being substituted for it. This is not charged on the land; it is charged on the owner in respect of the land. See further ECCLESIASTICAL LAW.

4 *Re Rivett-Carnac's Will* (1885) 30 ChD 136 at 139; and see generally PEERAGES AND DIGNITIES vol 79 (2008) PARAS 808, 822. However, a tenement did not include a personal annuity, ie an annuity not charged upon or arising out of land, although granted to a man and his heirs (see PARA 82 post). 'Tenement' was also used to denote not only the thing which was the subject of property, but also the estate in the thing. Thus, where a life estate was existing in land, both the land and the life estate were called tenements (Challis's Law of Real Property (3rd Edn) 44), but the life estate would now be an equitable interest, and 'tenement' appears to be confined to legal estates and interests. Subject to certain exceptions, no settlement created on or after 1

January 1997 is a strict settlement and no settlement is deemed to be made under the Settled Land Act 1925 on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

5 *Cornish v Cleife* (1864) 3 H & C 446 at 451; *Dashwood v Ayles* (1885) 16 QBD 295, CA; *Minifie v Banger* (1885) 16 QBD 302, CA. See also *R v Tadcaster Inhabitants* (1833) 4 B & Ad 703.

6 See *Yorkshire Fire and Life Insurance Co v Clayton* (1881) 8 QBD 421 at 423, CA; *Grant v Langston* [1900] AC 383, HL; *London and Westminster Bank Ltd v Smith* (1902) 87 LT 244, HL. A building divided into separate tenements constitutes separate houses within the meaning of a covenant not to erect more than one house on a site: *Ilford Park Estates Ltd v Jacobs* [1903] 2 Ch 522. See also *Rogers v Hosegood* [1900] 2 Ch 388, CA; *Kimber v Admans* [1900] 1 Ch 412, CA; *Day v Waldron* (1919) 88 LJKB 937.

7 *Redington v Millar* (1888) 24 LR Ir 65, Ir CA. See also *Fredericks v Howie* (1862) 1 H & C 381. Thus in rating legislation the context may show that the words 'tenements' and 'hereditaments' are used to mean only permanent substantial objects (*R v Manchester and Salford Water Works Co* (1823) 1 B & C 630; *Colebrooke v Tickell* (1836) 4 Ad & El 916; *East London Waterworks Co v Mile-End Old Town Trustees* (1851) 17 QB 512; *Lyndon v Standbridge* (1857) 2 H & N 45), but a wider sense will be given to them if this appears to be the intention, where, eg particular rights are excepted (*R v Shrewsbury Paving Streets Trustees* (1832) 3 B & Ad 216). See also *R v Barker* (1837) 6 Ad & El 388 (tithes); and see generally RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 12 et seq. As to the abolition of domestic rates, and their replacement with the community charge, itself now replaced by the council tax, see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 521; and LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 516; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(i) Definitions/79. Meaning of 'hereditaments'.

79. Meaning of 'hereditaments'.

Any property which might, on an intestacy occurring before 1926, have devolved upon the heir of the intestate is a hereditament[1]. 'Hereditament' includes land as a physical object[2], money which is liable to be invested in land and is treated in equity as land[3], heirlooms[4] and certain rights in land and other rights[5]. Hereditaments are either corporeal or incorporeal[6].

1 Co Litt 6a; *Marquis of Winchester's Case* (1583) 3 Co Rep 1a at 2b; Shep Touch (8th Edn) 91. The term signifies 'all such things, whether corporeal or incorporeal [as] a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed', go to the heir, and not as chattels to the executor or administrator (*Lloyd v Jones* (1848) 6 CB 81 at 90), that is, heritable property (*Prescott v Barker* (1874) 9 Ch App 174 at 190). The term is preserved by statute notwithstanding that descent to the heir has been abolished (see PARA 96 note 5 post): see the definition of 'hereditament' in the Law of Property Act 1925 s 205(1)(ix) (as amended) ('hereditament' means any real property which on an intestacy occurring before 1 January 1926 might have devolved upon an heir). The definition is repeated in the Settled Land Act 1925 s 117(1)(vii); the Trustee Act 1925 s 68(6) (as amended); the Land Registration Act 1925 s 3(viii) (as amended); the Land Charges Act 1972 s 17(1) (as amended); and the Universities and College Estates Act 1925 s 43(iii).

2 As to land as a physical object see PARAS 1, 76-77 ante, 80 post. If there is nothing specially to define the meaning of 'hereditament', it refers to land as the subject matter of rights, and not to the quantum of the interest in the land. The settled sense of 'hereditaments' is to denote such things as might formerly be the subject matter of inheritance, but not inheritance itself: *Moor v Denn* (1800) 2 Bos & P 247 at 251, HL; *Chew v Holroyd* (1852) 8 Exch 249. Thus, on the construction of a statute 'corporeal or incorporeal hereditaments' may include leaseholds (*Tomkins v Jones* (1889) 22 QBD 599, CA), but 'hereditaments' was held not to include copyholds (*A-G v Lewin* (1837) 8 Sim 366 at 370; *Re Paddington Charities* (1837) 8 Sim 629). As to the meaning of 'hereditaments' in the Lands Clauses Consolidation Act 1845 see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 511; and for its meaning in the Town and Country Planning Act 1990 see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 987. See also the Local Government Finance Act 1988 s 64 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 33.

3 *Basset v St Levan* (1894) 43 WR 165; *Re Gosselin, Gosselin v Gosselin* [1906] 1 Ch 120. See also EQUITY vol 16(2) (Reissue) PARA 706, but note that the doctrine of conversion has now been abolished with regard to land held by trustees subject to a trust for sale: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and PARA 77 ante.

4 2 Bl Com (14th Edn) 17. See also PARA 89 post; and SETTLEMENTS.

5 Thus, an inheritable dignity, whether it concerns land or not, is a hereditament: *Re Rivett-Carnac's Will* (1885) 30 ChD 136; *Earl of Cowley v Countess of Cowley* [1900] P 305 at 310, CA (affd [1901] AC 450, HL).

6 Co Litt 6a. For the meaning of 'corporeal hereditament' and 'incorporeal hereditament' see PARAS 1 note 1 ante, 80-81 post. Generally a tenement is also a hereditament; but some tenements, such as an estate for life, are not hereditaments, and some hereditaments, such as (before 1926) personal annuities limited to heirs, were not tenements: see Co Litt 6a; Shep Touch (8th Edn) 91; Challis's Law of Real Property (3rd Edn) 44. In *Stephenson v Raine* (1853) 2 E & B 744, it was decided that the office of parish clerk held for life was a hereditament on the ground that it was a tenement, and every tenement was a hereditament, but this seems to overlook the real nature of a hereditament: see Shep Touch (8th Edn) 91.

UPDATE

79 Meaning of 'hereditaments'

NOTE 1--Land Registration Act 1925 replaced by the Land Registration Act 2002: see LAND REGISTRATION.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(ii) Corporeal and Incorporeal Hereditaments/80. Corporeal hereditaments.

(ii) Corporeal and Incorporeal Hereditaments

80. Corporeal hereditaments.

Land itself, and also such physical objects as are annexed to and form part of it, or are treated as forming part of it, are corporeal hereditaments, and strictly are the only corporeal hereditaments[1]. However, those estates in land, whether legal or equitable, which before 1926 were capable of passing by descent[2], and which entitled the owner to present possession of the land or to receipt of rents and profits, were classed as corporeal hereditaments[3], and this applies to the legal estates and equitable interests which now represent the former legal and equitable estates[4]. Whatever the interest may be, if it entitles the owner to present possession or receipt of rents and profits and would before 1926 have been inheritable, it is treated as taking on corporeal nature and ranks as a corporeal hereditament.

1 'Corporeal hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of land only': 2 Bl Com (14th Edn) 17. *Haereditas corporalis est, quae tangi potest et videri; incorporalis, quae tangi non potest nec videri* ('An inheritance is in some cases corporeal and in others incorporeal; a corporeal inheritance is one which is tangible and visible; and incorporeal inheritance is intangible and invisible'): Co Litt 9a.

2 An estate pur autre vie was not a hereditament, since the heir, if he took, would take as special occupant, and not by inheritance: see PARA 155 post, and Challis's Law of Real Property (3rd Edn) 44. An estate, or interest, pur autre vie now passes to the personal representative: see the Administration of Estates Act 1925 s 1(1). As to such estates and interests see PARA 151 et seq post.

3 The immediate estate or interest in the land is, strictly, like any other right, incorporeal, but the actual possession attracts it into the class of corporeal hereditaments; or this classification can be treated as an instance of the confusion between the right of property and the subject of property. See PARA 1 ante.

4 For the general principles of the property legislation of 1925 see PARA 43 et seq ante.

81. Incorporeal hereditaments.

Incorporeal hereditaments[1] include (1) rights in land which are not accompanied by exclusive possession; these are seigniories, franchises, profits à prendre, advowsons, rentcharges, rights of common and, possibly, easements[2]; (2) certain heritable rights not necessarily connected with land, such as offices[3]. Reversions, remainders, and executory interests[4] and conditions[5] have usually been classed as incorporeal hereditaments, but the classification is not satisfactory.

Incorporeal hereditaments may be either appendant, as seigniories[6]; appurtenant, as easements[7]; or in gross, as rentcharges[8]. Rights of common and profits à prendre may be either appendant or appurtenant or in gross[9]. All advowsons are now in gross[10].

1 As to incorporeal hereditaments see generally Co Litt 9a, 47a, 49a, 169a; 2 Bl Com (14th Edn) 20 et seq; Burton's Compendium of the Law of Real Property (8th Edn) 319 et seq. 'An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same': 2 Bl Com (14th Edn) 20, cited in *Re Christmas, Martin v Lacon* (1886) 33 ChD 332 at 338, CA, per Cotton LJ. There are now no personal hereditaments: see PARA 82 post.

2 As to seigniories see PARAS 7 ante, 84 post. As to franchises see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 879-882; HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 888 et seq (ferries); and see also CUSTOM AND USAGE; AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 789 et seq; MARKETS, FAIRS AND STREET TRADING. As to advowsons see ECCLESIASTICAL LAW. An advowson in gross passes by the words 'tenements and hereditaments': *Westfaling v Westfaling* (1746) 3 Atk 460. All advowsons formerly appendant are now advowsons in gross: see note 10 infra. As to rentcharges see PARA 83 post; and see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq. As to rights of common see COMMONS vol 13 (2009) PARAS 405, 431 et seq; and as to easements and profits à prendre see EASEMENTS AND PROFITS A PRENDRE. Land charges (as to which see LAND CHARGES), where not accompanied by a legal estate, are in the nature of incorporeal rights in land. Other incorporeal hereditaments include an exclusive right of burial in a churchyard, but not in a cemetery: see CREMATION AND BURIAL.

3 2 Bl Com (14th Edn) 36. As to descent of dignities see PEERAGES AND DIGNITIES vol 79 (2008) PARA 808. Formerly, personal annuities which passed to the heir were considered to be incorporeal hereditaments (2 Bl Com (14th Edn) 41): see PARA 82 post.

4 Williams on the Law of Real Property (24th Edn) 395 et seq; Challis's Law of Real Property (3rd Edn) 44, 48. Since these interests will or may be clothed with possession, they are of a different nature from rentcharges and the other interests mentioned under head (1) in the text which can never lead to possession. There was, however, formerly a conveyancing reason for classing future interests with incorporeal hereditaments, since they were transferred by deed of grant, or, as it was said, lay in grant (Co Litt 9a, 49a), whereas an estate in land accompanied by possession passed by livery. However, this distinction was abolished by the Real Property Act 1845 s 2 (repealed), under which corporeal hereditaments were, as regards the immediate freehold, to be deemed to lie in grant as well as livery; and by the Law of Property Act 1925 s 51(1), conveyance by livery or livery and seisin is abolished. This leaves only the want of present possession, for excluding future interests from the class of corporeal hereditaments, and for want of a better classification they have been put with such rights as rentcharges from which they are essentially different. A rentcharge is, like land, the subject of estates; a remainder or reversion was itself an estate and is now an equitable interest: see PARAS 2, 44-46 ante. Although there are objections to classing together rights in the full ownership, like remainders, and rights of partial ownership, like rentcharges and easements, it must, it seems, be accepted that future estates are technically described as incorporeal hereditaments, and nonetheless that they are now equitable interests. For an argument in favour of a different view see Challis's Law of Real Property (3rd Edn) 52-53. As to the distinction between corporeal and incorporeal hereditaments see further Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 141-142.

5 2 Bl Com (14th Edn) 17.

6 A right appendant must have been created before 18 Edw 1 (Quia Emptores) (1289-90) c 1: see PARA 7 ante.

7 See generally EASEMENTS AND PROFITS A PRENDRE.

8 See RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 758.

9 See COMMONS vol 13 (2009) PARA 431 et seq; EASEMENTS AND PROFITS A PRENDRE.

10 See the Patronage (Benefices) Measure 1986 s 32; and ECCLESIASTICAL LAW.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(ii) Corporeal and Incorporeal Hereditaments/82. Real and personal hereditaments.

82. Real and personal hereditaments.

Hereditaments were formerly divided into real and personal. Real hereditaments included land and estates of inheritance in land, and also all heritable rights which were connected with or incident to land[1]. Heritable rights which had no connection with land were personal hereditaments[2]. Of this nature were personal annuities granted to a man and his heirs[3]. Personal hereditaments, notwithstanding that they were limited to heirs and passed to heirs on an intestacy, were personal estate and passed under a residuary bequest of personalty[4].

In the case of persons dying after 31 December 1925, the rules of inheritance have been abolished alike for real and personal hereditaments[5], and according to the proper meaning of 'hereditaments' there can in such cases be no hereditaments of either kind; but the term 'hereditaments' can still be used to denote property which, under the law before 1926, would have fallen in the class of real hereditaments[6].

1 For a further division of hereditaments into real, personal and mixed see Co Litt 6a; Challis's Law of Real Property (3rd Edn) 45. Mixed hereditaments are apparently such as savour of the realty, but do not confer possession of the land; but the division into real and personal hereditaments is sufficient. The practical distinction between them was that real hereditaments were entailable; personal hereditaments were not: Co Litt 19b, 20a. Shares in companies possessing land, where the proprietors had a direct interest in the land, were real hereditaments. As to the former New River shares see *Drybutter v Bartholomew* (1723) 2 P Wms 127; *Lord Townsend v Ash* (1745) 3 Atk 336; and as to River Avon shares see *Buckeridge v Ingram* (1795) 2 Ves 652. See further Challis's Law of Real Property (3rd Edn) 46, 57.

2 See *Re Christmas, Martin v Lacon* (1886) 33 ChD 332 at 338, 345, CA.

3 *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170; *Buckeridge v Ingram* (1795) 2 Ves 652.

4 *Aubin v Daly* (1820) 4 B & Ald 59; *Radburn v Jervis* (1841) 3 Beav 450 at 461.

5 Administration of Estates Act 1925 s 45(1)(a).

6 For the meaning of 'hereditaments' see PARA 79 ante. In conveyancing the term 'hereditaments' is being replaced by 'property', but it is still used in the law of rating to denote the subject of assessment: see the Local Government Finance Act 1988 ss 43, 64 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 33. As to the abolition of domestic rates, and their replacement with the community charge, itself now replaced by the council tax, see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 521; and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(iii) Rents/83. Rent service and rentcharge.

(iii) Rents

83. Rent service and rentcharge.

Rent is either rent service[1] or rentcharge[2]. In either case it is a periodical payment made in respect of land, but the two forms of rent are fundamentally different. Rent service is incident to the relationship of landlord and tenant. It is a payment made by the tenant as a recompense for the use of the land[3], and the receipt of it constitutes the chief beneficial right of ownership. The landlord enjoys his ownership by virtue of the receipt of rent. A rentcharge, on the other hand, is a burden on the ownership. The owner of the rentcharge is entitled to a fixed periodical sum as against the owner of the land, and, in effect, this is paid out of the rent service which the owner of the land receives[4].

1 As to services incidental to feudal tenure, and the gradual development of rent service, see PARA 4 et seq ante.

2 Three manner of rents there be, that is to say, rent service, rentcharge and rent seck: Littleton's Tenures s 213. Rent seck was formerly a rent without power of distress (Littleton's Tenures ss 217, 218), but as a power of distress is now incident to every rent charged on land (see the Landlord and Tenant Act 1730 s 5; the Law of Property Act 1925 s 121 (as amended)), rents seck have ceased to exist. A rentcharge is a rent issuing out of land and secured, whether expressly or by statute, by a power of distress. As to rentcharges see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

3 As to rents reserved on leases see DISTRESS vol 13 (2007 Reissue) PARA 905; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 242 et seq.

4 See Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 646 et seq. The Rentcharges Act 1977 prohibits, subject to certain important exceptions, the creation of new rentcharges and provides for the extinguishment of many existing rentcharges: see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(iii) Rents/84. Rent incident to seigniory.

84. Rent incident to seigniory.

Before the Statute Quia Emptores[1] a tenant in fee simple could grant the land for a like estate by way of subinfeudation, and on such grant could reserve a rent[2]. His right in the land was changed to a seigniory and the rent was incident to the seigniory as a rent service. Such rents were known as 'chief rents' and 'fee farm rents'[3]; but fee farm rents in theory differed from chief rents in being reserved as the actual equivalent for the use of the land instead of being reserved as a service due to the lord. Fee farm rents were the ancient form of conventional rent, and accordingly they were assumed to be substantial in amount. It has been said that a fee farm rent must be at least one-quarter of the annual value of the land[4]. All rents of this nature, which were manorial incidents and were existing on 31 December 1925, were saved at that time, but were extinguished at the latest on 31 December 1935[5].

1 Ie 18 Edw 1 (Quia Emptores) (1289-90) c 1. See also PARA 7 ante.

2 Littleton's Tenures s 216.

3 The rents were also known as rents of assize and quit rents. A rent of assize was a rent which had been assized, or reduced to a certainty, by the lord of the manor (2 Co Inst 19); a quit rent was a rent reserved in lieu of all other services. In principle there was no distinction between chief rents, rents of assize and quit rents. As to these forms of rent see 2 Bl Com (14th Edn) 42-43; Scriven on Copyholds (7th Edn) 240; and CUSTOM AND

USAGE. Rents of assize and quit rents might also be payable by copyholds. For the modern meaning of 'chief rent' and 'fee farm rent' see PARA 85 note 2 post.

4 'If it be the whole value of the land, or to the fourth part of the value, then the rent is called a fee farm' (Co Litt 143b; 2 Bl Com (14th Edn) 43; and see PARA 5 ante); or, perhaps, the expression 'to hold in fee farm' implies the perpetual nature of the holding: see 3 Holdsworth's History of English Law 52.

5 See the Law of Property Act 1922 ss 128-140 (repealed except s 137); the Law of Property Act (Postponement) Act 1924 s 1 (repealed). These sections refer to the extinguishment of manorial incidents affecting enfranchised land, and all manorial incidents of a like nature affecting any other land: see PARA 31 et seq ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/(1) CORPOREAL AND INCORPOREAL RIGHTS/(iii) Rents/85. Estates in respect of which rents are reserved.

85. Estates in respect of which rents are reserved.

After the Statute Quia Emptores[1] the reservation of rent service on the grant of land in fee simple was impossible[2], but it could be reserved on a grant of land for any less estate. Such a grant, whether in tail, for life or lives, or for years[3], left a reversion in the grantor; to this reversion the rent service was incident[4], and the reversioner had at common law a power of distress for recovery of the rent[5]. Reservations of rent on a grant of an estate tail did not occur in practice, and, since an existing estate tail is now an equitable interest[6], such a reservation would hardly be practicable. A grant of a lease at a rent for life or lives now takes effect as a grant for a term of 90 years determinable[7]. The grant of a lease for years at a rent is, however, the ordinary case of the creation of a lease for years. Rents reserved on such leases are called 'conventional rents', and when the rent represents the full value of the tenement, by the year, that is, the gross value, or nearly so, it is called a 'rack rent'[8].

1 Ie 18 Edw 1 (Quia Emptores) (1289-90) c 1. See also PARA 7 ante.

2 A grant might, however, be made in fee simple, reserving a rentcharge, and to prevent it being a rent seck an express power of distress was inserted, until the statutory powers of distress made this unnecessary: see PARA 83 note 2 ante. This led to the modern 'chief rent' or 'fee farm rent' sometimes created on a sale of building land, but see now para 83 note 5 ante; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 756. For the use of 'fee farm rent' as a modern term see the Law of Property Act 1925 s 146(5)(a); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619.

3 Littleton's Tenures s 214. This assumes that the grantor had a sufficient estate to support the grant.

4 The reversion must remain in the grantor; if he granted the rest of the fee simple over as a remainder, he could not reserve a rent as rent service: Littleton's Tenures s 215. However, the rent was not, like fealty, inseparably incident to the reversion, and the lessor could subsequently grant the reversion and reserve the rent to himself, or vice versa (Co Litt 143a), but the power of distress followed the reversion. See further DISTRESS vol 13 (2007 Reissue) PARA 968; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 250.

5 Littleton's Tenures s 213.

6 As to equitable interests see PARA 46 ante. No new estates tail may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARA 105 post.

7 Law of Property Act 1925 s 149(6). See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

8 2 Bl Com (14th Edn) 43. It has been said that a rack rent is a rent that represents the full annual value of the holding (*Ex p Connolly to Sheridan and Russell* [1900] 1 IR 1 at 6, Ir CA), but annual value means primarily net annual value, while rack rent is the full or gross rental as distinguished from net annual value (*Stevens v Barnet District Gas and Water Co* (1888) 36 WR 924, DC): see Stroud's Judicial Dictionary (5th Edn) 2136. The payment of a premium shows that the rent is not a rack rent: *Ex p Connolly to Sheridan and Russell* supra. Where the Rent Act 1977 (largely repealed subject to transitional provisions: see LANDLORD AND TENANT vol 27(2)

(2006 Reissue) PARA 808 et seq) applies, the maximum rent recoverable is the rack rent, notwithstanding that this is lower than the open market rent: *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642. For a statutory definition of 'rack rent' see the Public Health Act 1936 s 343(1) (repealed and replaced, without that definition, in the Water Industry Act 1991 s 219(1); the Clean Air Act 1993 s 64(1)). See also *Report on the Consolidation of the Legislation Relating to Water* (Law Com No 198; Cm 1483) PARA 18, which recommended the removal of the statutory definition of 'rack rent'.

UPDATE

85 Estates in respect of which rents are reserved

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/ (2) CHATTELS IDENTIFIED WITH REAL ESTATE/86. Title deeds and heirlooms.

(2) CHATTELS IDENTIFIED WITH REAL ESTATE

86. Title deeds and heirlooms.

Generally, chattels personal have always devolved upon the death of the owner on his personal representatives, to be disposed of by them as personal estate[1], but certain chattels were so associated with real estate that they followed its quality as regards inheritance, and in cases of death intestate before 1926 they devolved on the heir-at-law[2]. Such chattels were either title deeds or heirlooms, and although devolution on the heir-at-law has been abolished[3], it is still useful to consider the nature of their association with the land.

1 As to the devolution of chattels personal see EXECUTORS AND ADMINISTRATORS; and as to chattels personal generally see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1204-1205.

2 This was subject, in cases of death after 1897, to the rights of the personal representatives under the Land Transfer Act 1897 s 1 (replaced by the Administration of Estates Act 1925 s 1).

3 See the Administration of Estates Act 1925 s 45(1)(a); and PARA 15 note 6 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/ (2) CHATTELS IDENTIFIED WITH REAL ESTATE/87. Owner's right to custody of title deeds.

87. Owner's right to custody of title deeds.

The title deeds of land are of use only to the owner of land in order to enable him to maintain his title[1], and it is the general rule that whoever is entitled to the land has also a right to all the title deeds affecting it[2]. Accordingly, the owner of land is entitled to the custody of the title

deeds relating to it, and may maintain an action for them notwithstanding that the conveyance to him contains no express grant of the deeds[3].

This rule is necessarily varied first, where the deeds are common to the titles of the owners of different lands, and secondly, where the land is subject to different, simultaneous or successive interests. In the case of common title deeds, arrangements are usually made upon sales or other dispositions of land as to the owner who shall hold them, and he gives an acknowledgment for production and for delivery of copies to the other owners, and also, unless he is a trustee or other fiduciary owner, an undertaking for their safe custody[4]. As between co-owners, it was the rule, apart from the effect of the Law of Property Act 1925, that whoever obtained the deeds was entitled to hold them, but he must produce them to the others[5]. Where, however, the co-owners are tenants in common or joint tenants, the land is now vested in trustees subject to a trust of land[6], and the trustees are entitled to arrange for the holding of the deeds[7]. As between a legal tenant for life and remainderman, the tenant for life was entitled to hold the deeds[8], and since the legal estate in fee simple will now usually be vested in him[9], he has an additional right as owner of the legal estate[10]. As between trustee and beneficiary, the beneficiary, if he is entitled to possession, may be given the custody of them by the court[11], and as against a stranger a bare trustee has a right to the title deeds[12]. As between mortgagor and mortgagee the possession of the deeds by the mortgagee is an essential part of the security[13]. As between landlord and tenant, the tenant has no right to the deeds relating to the freehold interest[14], but he is entitled to those relating to the term[15].

1 'The evidences are, as it were, the sinews of the land': Co Litt 6a. The expression 'title deeds' as used in the old cases appears to refer only to documents by which the land or some legal interest in it is assured or dealt with, and not to include, eg, appointments of new trustees: *Clayton v Clayton* [1930] 2 Ch 12 at 21 per Maugham J. Title deeds are nevertheless property within the Married Women's Property Act 1882 s 17 (as amended): *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812.

2 *Harrington v Price* (1832) 3 B & Ad 170 at 173. As to the right to the deeds of the guardians of a tenant in tail who was a minor see *Lethbridge, Couldwell v Lethbridge* (1917) 61 Sol Jo 630. Now, the legal estate would be in trustees; but note that no further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARA 105 post.

3 *Re Williams and Duchess of Newcastle's Contract* [1897] 2 Ch 144 at 148. Upon a conveyance under the Statute of Uses (1535) (repealed), the legal estate which vested in the person for whose benefit the use was created carried with it the right to the deeds: *Clayton v Clayton* [1930] 2 Ch 12.

4 As to common title deeds see SALE OF LAND.

5 As to a mortgagee's rights and liabilities as regards title deeds see MORTGAGE vol 77 (2010) PARA 101 et seq.

6 As to the treatment under the transitional provisions in the Law of Property Act 1925 of undivided shares in land see PARA 55 ante. As to joint tenancies see PARA 189 et seq post and as to tenancies in common see PARA 207 et seq post.

7 They 'are trustees of the deeds no less than they are of the legal estate': *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 222, [1984] 1 All ER 144 at 152 per Mann J; affd [1985] QB 210 at 241, [1984] 2 All ER 585 at 600, CA. Accordingly, if the trustees must act unanimously, one cannot part with the title deeds without the consent of the others: *Thames Guaranty Ltd v Campbell* supra. See further PARA 194 text and note 5 post. It is no longer possible to create a charge merely by the deposit of title deeds: see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. The trustees may arrange for one of them to hold the deeds, but it is safer and more usual to place them in the custody of the trustees' solicitor or of a bank.

8 *Garner v Hannyngton* (1856) 22 Beav 627; and see SETTLEMENTS.

9 As to such vesting see PARA 144 post.

10 The owner of the legal estate is prima facie entitled to the possession of the title deeds: *Clayton v Clayton* [1930] 2 Ch 12 at 19.

11 This was so, even if the beneficiary was only tenant for life: *Re Wythes, West v Wythes* [1893] 2 Ch 369; *Re Dodd, Dodd v Dodd* (1918) 62 Sol Jo 451. As to a beneficiary's right to occupy trust land see PARA 68 ante.

12 *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812.

13 See *Re Ingham, Jones v Ingham* [1893] 1 Ch 352 at 361; and MORTGAGE vol 77 (2010) PARA 262. As to priorities as affected by the possession of title deeds see EQUITY vol 16(2) (Reissue) PARA 569; and MORTGAGE vol 77 (2010) PARA 262. As to the effect of a plea of purchase for value without notice on the right to deeds see EQUITY vol 16(2) (Reissue) PARAS 565-567. Where a mortgagor is in possession and the title of the mortgagee has been extinguished under what is now the Limitation Act 1980, the mortgagor is entitled to recover the title deeds by action: *Lewis v Plunket* [1937] Ch 306, [1937] 1 All ER 530; and see LIMITATION PERIODS vol 68 (2008) PARA 992.

14 *Harper v Faulder* (1819) 4 Madd 129 at 138; *Hotham v Somerville* (1842) 5 Beav 360. This was one of the reasons why term mortgages did not come into general use although they were not uncommon in the early part of the nineteenth century. When term mortgages were substituted by the Law of Property Act 1925 for fee simple mortgages the difficulty was met by providing that a first mortgagee under a mortgage by demise should have the same right to the possession of documents as if his security included the fee simple: see s 85(1); and MORTGAGE vol 77 (2010) PARA 262.

15 See *Hooper v Ramsbottom* (1815) 6 Taunt 12.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/ (2) CHATTELS IDENTIFIED WITH REAL ESTATE/88. Other evidence of title.

88. Other evidence of title.

Deeds, court rolls and other evidences of title to land formerly passed on the death of the tenant in fee simple intestate to the heir-at-law and not to the administrator; and so also did a box or chest exclusively appropriated to them[1]. Now all these things devolve on the administrator, but as part of the real estate[2], and they are held in trust by the personal representatives with the power to sell[3]; but the tenant in fee simple may dispose of the deeds in his lifetime[4].

1 2 Bl Com (14th Edn) 428; Williams, Mortimer and Sunnucks *Executors, Administrators and Probate* (17th Edn) 508. See also EXECUTORS AND ADMINISTRATORS.

2 See generally the Administration of Estates Act 1925 s 1. Title deeds in the possession of an owner who dies after 1925 pass on his death to his personal representatives and will be delivered by them to the person in whom they vest the land by assent or conveyance.

3 See ibid s 33(1) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5(1), (2)).

4 *Kelsack v Nicholson* (1596) Cro Eliz 496; *Clayton v Clayton* [1930] 2 Ch 12 at 18.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/ (2) CHATTELS IDENTIFIED WITH REAL ESTATE/89. Heirlooms.

89. Heirlooms.

Heirlooms[1] were articles which, either from their connection with real estate or by special custom, formerly passed, on the death of the ancestor, to the heir[2]. They were connected in this manner with real estate when they were an incident of the tenure of land, or were necessary for maintaining the dignity of the owner of land or the possessor of a title. An ancient horn, where the tenure was by cornage[3], the garter and collar of a knight[4], the ancient jewels of the Crown[5], and a patent creating a dignity, were all heirlooms[6] and may still properly be so

styled. However, since descent to the heir has been abolished, and heirlooms devolve, in the first instance, with the real estate, on the ancestor's personal representatives, the vesting in the heir may only be secured by special provision, such as a limitation under which the heir takes by purchase[7]. The title of the heir will then be completed by assent. Chattels may, possibly, also be heirlooms on the ground that they are an essential feature in the ordinary enjoyment of the land, for example, wild deer in a park[8], assuming that they can be the subject of property at all. If they are so far tame as to be under control, they are personal property[9].

By special custom, such articles as the best bed and utensils, and other household implements, might be heirlooms, but the custom had to be strictly proved[10].

1 'Heirloom' is derived from 'loom', an Anglo-Saxon word meaning tool or utensil: Oxford English Dictionary, sv 'Heirloom'.

2 *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483 at 494, CA. As to heirlooms see generally 2 Bl Com (14th Edn) 427; Williams, Mortimer and Sunnucks *Executors, Administrators and Probate* (17th Edn) 506 et seq; and EXECUTORS AND ADMINISTRATORS; SETTLEMENTS. Title deeds are sometimes classed as heirlooms: 2 Bl Com (14th Edn) 427. As to the custody of title deeds see PARA 87 ante.

3 Eg the Pusey horn: *Pusey v Pusey* (1684) 1 Vern 273. Tenure by cornage imposed on the tenant the duty of winding a horn to warn the King's subjects of the entry into the kingdom of the King's enemies: Littleton's Tenures s 156; Co Litt 106b.

4 It was so held in the *Earl of Northumberland's Case* (1584) Owen 124, but probably the Crown has a claim.

5 Co Litt 18b.

6 *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, CA. Armour and other relics hung in a church in honour of an ancestor were also heirlooms. The parson could not remove them, even assuming that they were annexed to his freehold, and the heir had an action against any person who defaced them: Co Litt 18b.

7 See the Law of Property Act 1925 s 132(1); and PARA 169 post.

8 2 Bl Com (14th Edn) 428.

9 As to tame deer see ANIMALS vol 2 (2008) PARA 974.

10 Co Litt 18b; 2 Bl Com (14th Edn) 428; Williams, Mortimer and Sunnucks *Executors, Administrators and Probate* (17th Edn) 506-507. It would seem, however, that the custom need not be a custom in the strict sense so as to require proof of immemorial user (see CUSTOM AND USAGE), but that it would be sufficient to show the custom of the family for several generations. It is doubtful, however, whether any such customs were still existing when the Administration of Estates Act 1925 came into operation on 1 January 1926. If they were, they would be included in the general abolition of customary modes of descent, as to which see s 45(1)(a). The tenant in fee simple could, under the former law, dispose of heirlooms during his life, but if he did not do so and permitted the land to descend, he could not devise the heirlooms in a different direction: 2 Bl Com (14th Edn) 429. Any such rule appears now to be obsolete. Articles which are so attached to land or buildings as not to be removable without damage have been said to be heirlooms by general custom (2 Bl Com (14th Edn) 428), but they are in fact fixtures and follow the land because they are in law actually part of it: see PARA 76 text and note 3 ante; EXECUTORS AND ADMINISTRATORS; Williams, Mortimer and Sunnucks *Executors, Administrators and Probate* (17th Edn) 507.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/2. LAND AND INTERESTS IN LAND/ (2) CHATTELS IDENTIFIED WITH REAL ESTATE/90. Chattels in the nature of heirlooms.

90. Chattels in the nature of heirlooms.

Chattels which are not heirlooms[1] at common law may be settled in a manner corresponding to the trusts of a settlement of land so as to be inseparable from the land[2]. These so-called heirlooms are in fact the only heirlooms which usually occur in modern times[3].

1 As to heirlooms see PARA 89 ante.

2 As to trusts of a settlement of land see SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

3 See *Re Beresford-Hope, Aldenham v Beresford-Hope* [1917] 1 Ch 287; and SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(i) Quantum of Estate/91. Nature of fee simple absolute.

3. LEGAL ESTATES

(1) THE FEE SIMPLE ABSOLUTE

(i) Quantum of Estate

91. Nature of fee simple absolute.

An estate in fee simple approaches as near to absolute ownership as the system of tenure will allow[1]; when absolute and in possession it is the only estate of freehold which can now subsist at law[2]. However, in certain cases a fee simple is a fee simple absolute for the purposes of the Law of Property Act 1925 notwithstanding that it is liable to be divested or to cease. Thus (1) a fee simple which by virtue of the Lands Clauses Acts[3] or any similar statute[4] is liable to be divested; or (2) a fee simple subject to a legal or equitable right of entry or re-entry[5], is for the purposes of the Law of Property Act 1925 a fee simple absolute[6].

1 A man cannot have a greater estate of inheritance than fee simple: Littleton's Tenures s 11. In this phrase, 'fee' has lost its original meaning of feud or benefice (see PARA 4 note 3 ante), and denotes inheritance, while 'simple' denotes that the land was descendible to the heirs generally, without restraint to any particular class of heirs, such as heirs of the body: Co Litt 1b; and see 2 Bl Com (14th Edn) 105. The appropriate description to denote both ownership and tenure of land is that the owner is 'seised in his demesne as of fee', although the usual expression is 'seised in fee simple'. In the case of incorporeal hereditaments, the description is that he is 'seised as of fee': see 2 Bl Com (14th Edn) 106. In the Law of Property Act 1925 the owner of a legal estate is called 'the estate owner' (s 1(4)), but this does not indicate the nature of his estate, whether freehold or leasehold. As to the theory that there can be no absolute ownership in land see PARA 4 ante.

2 Ibid s 1(1)(a).

3 As to the Lands Clauses Acts see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 503, 509 et seq.

4 The Law of Property Act 1925 s 7(1) (as originally enacted) also referred to the School Sites Acts but that reference was removed by the Reverter of Sites Act 1987 s 8(2), (3), Schedule. As to the School Sites Acts see EDUCATION vol 15(2) (2006 Reissue) PARA 1354; and as to the Reverter of Sites Act 1987 see CHARITIES vol 8 (2010) PARA 70 et seq. The Local Government Act 1929 s 29 (repealed: see now the Highways Act 1980 ss 263(1), (2), 264(1)), (which vested certain highways in the local authority for a legal estate in fee simple determinable in the event of their ceasing to be public highways), was such a similar statute: *Tithe Redemption Commission v Runcorn UDC* [1954] Ch 383, [1954] 1 All ER 653, CA. See also the Literary and Scientific Institutions Act 1854; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 939 et seq; the Places of Worship Sites Act 1873; and ECCLESIASTICAL LAW.

5 This qualification of 'fee simple absolute' was introduced by the Law of Property (Amendment) Act 1926 s 7, Schedule.

6 Law of Property Act 1925 s 7(1) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). It was at one time thought that a fee simple vested in a corporation was liable to determine on the dissolution of

the corporation, and special provision was made for this case by the Law of Property Act 1925 s 7(2), but the true position is that, in default of any other owner, it passes to the Crown: *Re Strathblaine Estates Ltd* [1948] Ch 228, [1948] 1 All ER 162. See also CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304. As to escheat where the corporation holds of a mesne lord see PARA 254 text and notes 3-4 post.

UPDATE

91 Nature of fee simple absolute

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(i) Quantum of Estate/92. Duration of estate in fee simple.

92. Duration of estate in fee simple.

Before the abolition of descent to the heir[1], an estate in fee simple was capable of existing as long as there were heirs-at-law of the owner for the time being, and since the law did not expect that there would be a failure of heirs[2] the duration of the estate was, in theory, unlimited. If in fact the owner died intestate and without heirs, the land, save so far as it was required for payment of his debts, escheated to the lord, usually the Crown, under whom it was held[3]. This was the only way in which the estate, if absolute, could determine[4].

Now that descent to the heir and escheat for want of heirs are abolished[5], a similar result is produced by making the real estate (and its proceeds of sale) of an intestate part of his residuary estate and distributable among the persons entitled to share in it, while, if this distribution fails for want of persons entitled as his statutory relations, the residuary estate belongs to the Crown as bona vacantia and in lieu of any right to escheat[6]. Moreover, the tenant for the time being who transfers the fee simple transfers an interest which the law treats as exhausting the possible duration of the ownership of the land. Consequently, neither a reversion nor a remainder could be reserved or limited upon such a transfer, nor could there be any possibility of reverter[7]; but a fee simple may be devised by will subject to an executory devise over, and such devise over, provided it is not struck down by the rule against perpetuities[8], is effectual and cannot be defeated by the prior devisee[9]. Consequently, an alienee from such devisee takes subject to the executory devise. However, such an estate in fee simple, not being absolute, is now an equitable interest[10].

1 See the Administration of Estates Act 1925 s 45.

2 *Pells v Brown* (1620) Cro Jac 590 at 592.

3 Co Litt 13a. See also EXECUTORS AND ADMINISTRATORS.

4 As to estates in fee on condition or determinable see PARAS 97, 114 post.

5 See the Administration of Estates Act 1925 s 45(1)(a), (d). As to escheat generally see PARA 254 post.

6 See ibid s 46(1); and EXECUTORS AND ADMINISTRATORS.

7 *Pells v Brown* (1620) Cro Jac 590; Challis's Law of Real Property (3rd Edn) 220.

8 As to the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq.

9 *Pells v Brown* (1620) Cro Jac 590.

10 See the Law of Property Act 1925 s 1(1), (3). However, the devisee has the statutory power of sale of a tenant for life: Settled Land Act 1925 s 20(1)(ii). See also SETTLEMENTS. As to the avoidance of certain executory limitations see PARAS 177-178 post. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

93. Grant of fee simple absolute.

Before 1882 an estate in fee simple could only be created inter vivos by a limitation to the grantee 'and his heirs'[1]. It was not sufficient to use words implying the indefinite duration of the estate, such as a limitation to the grantee 'for ever'. The word 'heirs' made the estate of inheritance[2], and it was to the estate thus limited that the law attached the incident of indefinite duration[3]. In deeds executed after 31 December 1881 an estate in fee simple could be limited by the words 'in fee simple'[4]. If the word 'heirs', or, after that date, the phrase 'in fee simple', was not used, the limitation created only an estate for life[5].

These requirements are now abolished, and in deeds executed after 31 December 1925, unless a contrary intention appears, a conveyance of freehold land to any person without words of limitation, or any equivalent expression, passes to the grantee the fee simple or other the whole interest which the grantor had power to convey in the land[6]. Furthermore, unless a contrary intention appears therein, a conveyance of freehold land to a corporation sole by its corporate designation, without the word 'successors', passes to the corporation the fee simple or other the whole interest which the grantor had power to convey in the land[7].

The word 'heirs' was not required in wills. In the absence of a contrary intention, a devise by a testator seised in fee simple passed the whole estate to the devisee without words of limitation[8]. Moreover, an estate in fee simple might be created by reference to a limitation in another instrument or in another part of the same instrument where the word 'heirs' was used, even if it was not used in the referential limitation[9]; and the word 'heirs' was not required upon a release by one coparcener or joint tenant seised in fee simple to the others[10]; nor upon the grant of a rent between such persons by way of equality of partition[11]. Words implying the right to receive a rentcharge in perpetuity might under the former law be effectual to create a rentcharge in fee[12]; and at the present time it is sufficient to describe the rentcharge as perpetual[13].

1 In practice the limitation was to the 'heirs and assigns', but the words 'and assigns' did not enlarge the estate. It was fully created by the limitation to 'heirs'; the words were only declaratory of the power of alienation which would exist without them and had no conveyancing value: *Brookman v Smith* (1871) LR 6 Exch 291 at 306 (affd (1872) LR 7 Exch 271); *Milman v Lane* [1901] 2 KB 745, CA. In a will the word 'assigns' may, however, sometimes operate to give a power of appointment: *Quested v Michell* (1855) 1 Jur NS 488; and see *Brookman v Smith* supra; *Milman v Lane* supra. Originally the insertion of the word 'assigns' was necessary in order to give the power of alienation: see 2 Pollock and Maitland's History of English Law (2nd Edn) 14.

2 The word 'heirs' is construed as heirs general so as to give the fee simple, notwithstanding that the grantee cannot have any heirs except heirs of his body; eg if the grantee is illegitimate: 1 Preston's Abstracts of Title 272. In relation to dispositions of property made on or after 4 April 1988, however, see the Family Law Reform Act 1987 s 19, particularly s 19(2); and EXECUTORS AND ADMINISTRATORS; SETTLEMENTS.

3 Littleton's Tenures s 1; 2 Bl Com (14th Edn) 107. It was apparently essential to use the word 'heirs' in the plural (Co Litt 8b; *Chambers v Taylor* (1836) 2 My & Cr 376; but this was doubted in *Dubber d Trollope v Trollope* (1734) Amb 453 at 458); although in a will, when words of limitation were necessary to pass the fee, 'heir' might be a collective name so as to imply the plural (Co Litt 8b note (4); and see the criticism of that note in Challis's Law of Real Property (3rd Edn) 221). Perhaps the omission of 'his' did not destroy the effect of the

limitation, but in a limitation to two persons 'and heirs', the omission of the word 'their' made the limitation void for uncertainty, and they had only an estate for their lives: Co Litt 8b. Apparently a limitation to A 'or his heirs' gave A only an estate for life (*Mallory's Case* (1601) 5 Co Rep 111b at 112a), although in a grant to A 'or his heirs to hold to him and his heirs', the word 'or' was treated as an error and corrected (*Wright v Wright* (1750) 1 Ves Sen 409 at 411). See also *Goodtitle d Dodwell v Gibbs* (1826) 5 B & C 709; Challis's Law of Real Property (3rd Edn) 221.

4 Conveyancing Act 1881 s 51 (repealed). After this Act either 'heirs' or 'in fee simple' might be used, but one form or the other was necessary: *Re Fayle and Irish Feather Co's Contract* [1918] 1 IR 13. The exact statutory phrase was required to be used; 'in fee' was not enough (*Re Ethel and Mitchells and Butlers' Contract* [1901] 1 Ch 945), but the court has jurisdiction to rectify the instrument if satisfied that it did not carry out the real intention of the parties (*Re Ethel and Mitchells and Butlers' Contract* supra at 948; *Re Ottley's Estate* [1910] 1 IR 1; *Banks v Ripley* [1940] Ch 719, [1940] 3 All ER 49).

5 Littleton's Tenures s 1. Before 1882 even the words 'in fee simple' did not create more than a life interest: Shep Touch (8th Edn) 106. In a grant to a corporation sole, the word 'successors' was necessary to pass the fee simple, otherwise only a life estate passed, but in a grant to a corporation aggregate a fee simple passed without mentioning successors, because such a corporation never dies: see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1248-1249. The limitation of an equitable estate was prima facie treated with the same strictness as that of a legal estate, and the word 'heirs' was required to pass the equitable fee (*Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469, CA); although the intention of the grantor or appointor to create an equitable fee would prevail if the instrument had not been made by way of executed trust or if strict conveyancing language had not been used (*Re Oliver's Settlement, Evered v Leigh* [1905] 1 Ch 191; *Re Bostock's Settlement, Norrish v Bostock* supra; *Land Purchase Trustee, Northern Ireland v Beers* [1925] NI 191, NI CA; *Re Arden, Short v Camm* [1935] Ch 326). See also *Jameson v McGovern* [1934] IR 758, Ir CA; *Re Monckton's Settlement, Monckton v Monckton* [1913] 2 Ch 636 (effect of a trust for conversion); *Re Nutt's Settlement, McLaughlin v McLaughlin* [1915] 2 Ch 431 (mixed fund of realty and personalty).

6 Law of Property Act 1925 s 60(1), (4). Although descent to the heir is abolished, the word 'heirs' may still be used for the purpose of creating equitable limitations: see s 132; and PARA 96 text and note 9 post.

7 Ibid s 60(2).

8 See the Wills Act 1837 s 28 (amended by the Statute Law Revision (No 2) Act 1888); and WILLS vol 50 (2005 Reissue) PARA 660. Even before this statute a devise was not construed with the same strictness as a grant, and the entire fee simple passed if there were words to indicate such an intention: 2 Bl Com (14th Edn) 108.

9 Co Litt 9b; *Garde v Garde* (1843) 3 Dr & War 435. However, words of limitation were not supplied by reason of the grantee being defined so as to include his 'heirs': *Re Ford and Ferguson's Contract* [1906] 1 IR 607. See also *Gaussen and French v Ellis* [1930] IR 116, where a reference in a deed to a limitation in a will was held to create the same estates as would have been created by the will, although neither instrument contained words of limitation proper to a deed; and *Pugh v Drew* (1869) 17 WR 988.

10 Ie 'when an estate of inheritance passeth and continueth'; and similarly upon a release when an estate of inheritance passeth and continueth not, but is extinguished; when eg the grantee of a rent in fee simple released the rent to the tenant of the land, the rent was extinguished for ever, although the tenant's heirs were not mentioned: Co Litt 9b; Shep Touch (8th Edn) 327.

11 'Because the grantor has a fee simple in consideration whereof he granted the rent': Co Litt 10a. On a bargain and sale for valuable consideration, and on a fine or recovery, the fee simple might pass without words of limitation: see Challis's Law of Real Property (3rd Edn) 223, and the authorities referred to there.

12 See Challis's Law of Real Property (3rd Edn) 222n, referring to 18 Vin Abr 472 (Rent (A), 1).

13 As to prohibition on the creation of new rentcharges see PARA 83 note 4 ante; and RENTCHARGES AND ANNUITIES vol 39(2) PARA 774 et seq. The rentcharge is a legal estate: see the Law of Property Act 1925 s 1(2)(b), (4).

(ii) Incidents of Estate

94. Rights of user.

An owner in fee simple may exercise over the land acts of ownership of all kinds, including the commission of waste, such as the felling of trees, the opening and working of mines and the pulling down of houses, unless in so doing he interferes with some right created either by law or contract, or infringes the provisions of some statute, or unless he has in equity only a limited interest in the land[1]. Thus an unreasonable exercise of his rights which injures his neighbours in the use and enjoyment of their land constitutes an actionable nuisance, and may be restrained by injunction[2]. If the land is subject to easements[3], profits à prendre[4] or restrictive covenants[5], he may not use it in a manner inconsistent with the proper enjoyment of the easements or profits, or in a manner inconsistent with the due observance of the covenants. His rights of user and even of possession may be subject to those of persons entitled under a lease[6] or mortgage[7]. Statutory restrictions on the enjoyment of land have been imposed in the public interest[8], and, among other things, control the use to which the land may be put[9] and the rent which may be demanded from tenants[10], contain provisions to secure the repair or demolition of unfit houses[11], and regulate the construction of new buildings[12]. However, if an owner of a legal estate in fee simple has in equity only a life interest[13], or his estate is subject to an executory limitation over[14], he may be restrained in the interests of the remaindermen from committing waste.

1 *A-G v Duke of Marlborough* (1818) 3 Madd 498; *Wilson v Waddell* (1876) 2 App Cas 95, HL. Cf *Liford's Case* (1614) 11 Co Rep 46b at 50a; *Jervis v Bruton* (1691) 2 Vern 251; *Giles v Walker* (1890) 24 QBD 656.

2 This is in accordance with the maxim *sic utere tuo ut alienum non laedas* ('Use your own property so as not to injure your neighbours'), but there must be an injury recognised by law as actionable. A thing lawful in itself does not in general become actionable by being done with an intention to cause injury or annoyance; but this may be so if an owner with such intention does an act, such as burning limestone on a particular part of his land, when he might just as well do it elsewhere without causing annoyance: *Bradford Corpn v Pickles* [1895] AC 587 at 598, HL. See further NUISANCE vol 78 (2010) PARA 109 et seq.

3 See generally EASEMENTS AND PROFITS A PRENDRE. Note also the statutory right of access to neighbouring land for certain purposes: see the Access to Neighbouring Land Act 1992; NUISANCE vol 78 (2010) PARA 218; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARAS 112-120.

4 See further EASEMENTS AND PROFITS A PRENDRE.

5 See EQUITY vol 16(2) (Reissue) PARA 613 et seq.

6 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 1 et seq.

7 See MORTGAGE vol 77 (2010) PARA 101 et seq.

8 As to such statutory restrictions see PARA 70 et seq ante.

9 See Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 941 et seq; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 355 et seq; TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 213 et seq. See also the Disused Burial Grounds Act 1884; and CREMATION AND BURIAL.

10 See the Landlord and Tenant Act 1954; the Housing Act 1988; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 247 et seq. See also the Agricultural Tenancies Act 1995; and AGRICULTURAL LAND vol 1 (2008) PARA 309.

11 See, generally, the Housing Act 1985 Pt VI (ss 189-208) (as amended), Pt IX (ss 264-323) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 414 et seq.

12 See, generally, the Building Act 1984; and BUILDING.

13 As to the liability of a tenant for life for waste see SETTLEMENTS. Similarly, a tenant in tail after possibility of issue extinct is liable for equitable waste (see PARA 148 text and note 8 post) but an ordinary tenant in tail is not liable for waste (see PARA 117 note 8 post). Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no settlement is deemed to be made under that Act on or after

that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante. No further entailed interests may be created: see s 2(6), Sch 1 para 5; and PARA 105 post.

14 *Turner v Wright* (1860) 2 De GF & J 234 at 246; *Re Hanbury's Settled Estates* [1913] 2 Ch 357. The liability in this case is only for equitable waste; but the will or settlement may expressly prohibit other forms of waste, which will then be restrained, notwithstanding that the prohibition is also enforced by a clause of forfeiture: *Blake v Peters* (1863) 1 De GJ & Sm 345. See further SETTLEMENTS.

UPDATE

94 Rights of user

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(ii) Incidents of Estate/95. Rights of alienation.

95. Rights of alienation.

The owner of an estate in fee simple has an absolute right to alienate the land inter vivos[1], and, subject to the provisions of the Administration of Estates Act 1925[2], he can dispose of it by will[3].

1 As to the power of alienation see PARA 231 post.

2 See the Administration of Estates Act 1925 s 1; and EXECUTORS AND ADMINISTRATORS.

3 At common law, land held in fee simple was not devisable by will, but by the custom of London and certain other cities and boroughs land was devisable: Littleton's Tenures s 167; Co Litt 111a. Under 32 Hen 8 c 1 (Wills) (1540), explained and amended by 34 & 35 Hen 8 c 5 (Wills) (1542) (both now repealed), tenants in socage (see PARA 5 ante) could devise the whole, and tenants by knight service (see PARA 5 ante) two-thirds of their land: see Co Litt 111b. Upon the abolition of tenure in knight service, and the conversion of that tenure into socage tenure (see PARA 10 ante), the power to devise extended to all land held in fee simple by lay tenure. These statutes were repealed, and a new statutory power of devising land was given, by the Wills Act 1837 s 2 (repealed), s 3 (as amended): see WILLS vol 50 (2005 Reissue) PARA 328 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(ii) Incidents of Estate/96. Transmission and devolution.

96. Transmission and devolution.

During his life the owner in fee simple is liable to be deprived of his estate by process of execution[1], or by the operation of the law of bankruptcy[2]; and upon his death it devolves in the first instance on his personal representatives[3]. So far as the land is not required for payment of his debts, the beneficial interest devolves, if he has disposed of it by will, upon the specific or general devisee[4]; otherwise, before 1926, it devolved upon his heir-at-law ascertained in accordance with the Inheritance Act 1833[5], but now it is held in trust by his personal representatives with the power to sell it[6] and, so far as not required for purposes of administration, forms part of his residuary estate[7] and is distributed according to the rules of intestate succession[8]. Although the word 'heir' has become meaningless as a word of limitation

in an instrument taking effect after 1925, it can still be used as a description of a person in whose favour a disposition of real or personal property is made[9].

1 As to execution see generally EXECUTION.

2 As to property available in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 216, 390 et seq.

3 As to statutory devolution on personal representatives see EXECUTORS AND ADMINISTRATORS.

4 As to such devolution see WILLS vol 50 (2005 Reissue) PARAS 315-317.

5 As to the old rules relating to the descent of real estate see EXECUTORS AND ADMINISTRATORS. Descent to the heir has been abolished in the case of deaths after 1925: Administration of Estates Act 1925 s 45(1).

6 Ibid s 33(1) (s 33(1), (2), (4) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5).

7 Administration of Estates Act 1925 s 33(4) (as amended: see note 6 supra).

8 As to intestate succession generally, and as to mental disorder continuing from 1925 until death, see EXECUTORS AND ADMINISTRATORS.

9 See the Law of Property Act 1925 s 132, which enables a limitation of real or personal property to be made in favour of the heir, either general or special, of a deceased person, so as to have an effect corresponding to the limitation of freehold land to an heir taking by purchase; and see EXECUTORS AND ADMINISTRATORS. As to the construction of the word 'heir' see also the Family Law Reform Act 1987 s 19(2); and EXECUTORS AND ADMINISTRATORS; WILLS vol 50 (2005 Reissue) PARA 644.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(iii) Estate in Fee upon Condition/97. Estate in fee subject to right of entry.

(iii) Estate in Fee upon Condition

97. Estate in fee subject to right of entry.

An estate in fee simple may be granted upon condition[1], and, if the event contemplated by the condition happens, the grantor may re-enter and determine the estate, either by virtue of the condition merely, if it is suitably expressed, or otherwise by virtue of an express proviso for re-entry[2]. Thus, if the land is granted in fee simple upon condition that a specified yearly rent is paid, a right of entry is implied, and the grantor may re-enter if the rent is in arrear[3]. The same effect is produced where the grant, after reserving a rent, contains an express proviso that, if the rent falls into arrear, the grantor and his successors in title may re-enter[4]. Similarly there may be a proviso for re-entry if the land ceases to be used for a specified purpose[5]. Notwithstanding that the fee simple is subject to a right of re-entry it is for the purposes of the Law of Property Act 1925 a fee simple absolute[6] and is therefore a legal estate[7].

1 The condition will be a condition subsequent. As to conditions precedent and conditions subsequent see *Re Greenwood, Goodhart v Woodhead* [1903] 1 Ch 749, CA. As to estates upon condition, which are legal (see the text and notes 6-7 infra), and determinable fees, which are equitable (see PARA 114 post) see Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 336-351, and Goodeve and Potter's Modern Law of Real Property and Chattels Real 123 et seq.

2 Littleton's Tenures s 325. Besides conditions expressed in the grant there may be conditions implied by law. Thus, before 18 Edw 1 (Quia Emptores) (1289-90) (see PARA 7 ante), the grant of an estate in fee simple to be held of the grantor implied a condition that the services should be performed: Fearne's Contingent

Remainders 382n. As to such conditions see Littleton's Tenures s 378; Co Litt 233b. Littleton treats words of limitation as conditions in law: Littleton's Tenures s 380.

3 Littleton's Tenures ss 328, 331. This is subject to the provisions as to the extinguishment and prohibition of rentcharges in the Rentcharges Act 1977: see PARA 83 note 4 ante; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq. Other words of condition are 'provided always' and 'so that': Littleton's Tenures s 329; Co Litt 203b. In a condition a double negative does not necessarily make an affirmative: Co Litt 223b. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 210; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 604. Since no reversion exists on a grant in fee, such a rent is not rent service. As to payment of the rent see Littleton's Tenures s 341.

4 As to the effect of the Rentcharges Act 1977 see PARA 83 note 4 ante. Formerly the power was conferred on the grantor and his heirs: Littleton's Tenures ss 325, 330, 331. Such a rent is not incident to a reversion, in as much as since 18 Edw 1 (Quia Emptores) (1289-90) no tenure is created between grantor in fee simple and grantee: see *Doe d Freeman v Bateman* (1818) 2 B & Ald 168 at 170; and PARA 7 ante.

5 See *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540, where land was granted to trustees in fee for a charity in 1726, subject to a proviso that if at any time it should be employed for any other purposes, it should revert to the right heirs of the grantor.

6 See the Law of Property Act 1925 s 7(1) (as amended); and PARAS 45, 91 ante.

7 Ibid s 1(1)(a). The powers of the owner are the same as in the case of a determinable fee: see PARA 116 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(iii) Estate in Fee upon Condition/98. Determination of estate in fee upon condition.

98. Determination of estate in fee upon condition.

An estate upon condition cannot be defeated without actual entry or claim equivalent to entry. It is not ipso facto defeated by the happening of the critical event[1]. Since the grant of the estate exhausts the fee, the right of re-entry cannot be limited by way of remainder[2]. Formerly the right could be reserved only to the grantor and his heirs[3] but now it can be made exercisable by any person and the persons deriving title under him[4].

1 Co Litt 214b, 218a; Leake's Law of Property in Land (2nd Edn) 169. This only applies to an estate of freehold in corporeal hereditaments. It does not apply to incorporeal hereditaments: *A-G v Cummins* (1895) [1906] 1 IR 406 at 408.

2 As to such exhaustion of the fee, and limitation by way of remainder, see PARAS 163-164, 168 note 9 post.

3 Littleton's Tenures s 347; Co Litt 214b, 379a. See also *Manning's Case* (1609) 8 Co Rep 94b at 95b.

4 See the Law of Property Act 1925 s 4(3). Except in regard to a rentcharge held for a legal estate, the right is exercisable only within the period authorised by the rule relating to perpetuities: s 4(3). As to the rule against perpetuities see generally PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(1) THE FEE SIMPLE ABSOLUTE/(iii) Estate in Fee upon Condition/99. Estate in fee upon condition; validity of condition.

99. Estate in fee upon condition; validity of condition.

The condition is a common law condition and is subject to the rule against perpetuities[1]. The condition is invalid if it is unlawful[2], and, since an estate in fee simple is in its nature alienable, a condition in restraint of alienation is repugnant and therefore void[3].

1 *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 (as to which see PARA 97 note 5 ante); and see the Perpetuities and Accumulations Act 1964 s 12. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1040.

2 Co Litt 206b.

3 Littleton's Tenures s 360; Co Litt 206b. See also GIFTS vol 52 (2009) PARA 254; WILLS vol 50 (2005 Reissue) PARA 433.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/100. Statutory origin.

(2) ESTATE FOR YEARS

(i) Nature of the Estate

100. Statutory origin.

At common law an interest for a term of years did not originally confer an estate in the land. Between lessor and lessee there was only the relationship of contract, with the result that, if the lessee was evicted, his remedy was to recover compensation from the lessor, and although it was afterwards held that he could recover the land itself, the interest in the land which he thereby acquired was liable to be defeated by a collusive recovery suffered by the lessor. This liability was partially removed by the Statute of Gloucester[1] and more completely by a later statute[2]. The estate in the land which the lessee thereafter enjoyed was therefore in effect the creation of statute[3], and now a term of years absolute is one of the two forms of estates in land which are capable of subsisting or being created at law[4].

1 Ie 6 Edw 1 c 11 (Statute of Gloucester) (1278) (repealed).

2 21 Hen 8 c 15 (Recoveries) (1529) (repealed). As to the effect of these statutes see Co Litt 46a; 3 Holdsworth's History of English Law 214. As to the origin of leasehold interests see PARA 9 ante.

3 See Challis's Law of Real Property (3rd Edn) 64.

4 Law of Property Act 1925 s 1(1)(b).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/101. Meaning of 'term of years absolute'.

101. Meaning of 'term of years absolute'.

'Term of years absolute' means a term of years (taking effect in possession or reversion[1], whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate[2], and either certain or liable to determination[3] by notice, re-entry, operation of law, or by a provision for cesser on redemption[4], or in any other event (other than the dropping of a

life, or the determination of a determinable life interest)[5]. 'Term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year[6].

1 However, the expression does not include a term of years created after 1925 which is not expressed to take effect in possession within 21 years after its creation where required by the Law of Property Act 1925 to take effect within that period: s 205(1)(xxvii). See also s 149(3); note 2 infra; and PARA 102 post.

2 Two legal estates may subsist concurrently: see ibid s 1(5); and PARA 47 text and note 3 ante.

3 As to modes of determination of a term of years see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 600 et seq.

4 A provision for cesser on redemption is a necessary part of a mortgage by demise: see the Law of Property Act 1925 ss 85(1), 86(1); and MORTGAGE vol 77 (2010) PARAS 190-193.

5 Ibid s 205(1)(xxvii). The definition expressly excludes any term of years determinable with life or lives or with the cesser of a determinable life interest: s 205(1)(xxvii). A term at a rent for life or lives, or for a term of years determinable with life or lives, cannot now take effect as such: see s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240. Terms of years may be created under contracts of tenancy or under mortgages or settlements. Theoretically the nature of the interest which they confer is the same, whatever their object, but in practice the conditions on which mortgage and settlement terms are held make them quite distinct. See further PARAS 112-113 post; MORTGAGE vol 77 (2010) PARA 101 et seq.

6 Ibid s 205(1)(xxvii). As to the duration of a tenancy see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 198 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/102. Creation of term.

102. Creation of term.

It is essential to the creation of a term of years[1] that it should have a fixed beginning and a fixed ending[2] although it may be made to commence at any time within 21 years from the date of the instrument creating it[3]. To complete the estate of the lessee, actual entry was formerly necessary. Until entry he had only an interesse termini[4]. However, the doctrine of interesse termini has been abolished[5], and all terms of years absolute are now capable of taking effect without actual entry[6].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante. See also note 2 infra.

2 As to term of years generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

3 See the Law of Property Act 1925 s 149(3); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 106.

4 Ie the right of entry on land demised which the demise gave to the lessee before he had entered upon the land.

5 See the Law of Property Act 1925 s 149(1).

6 As to entry and the doctrine of interesse termini see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 118.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/103. Personal estate.

103. Personal estate.

A term of years[1] is personal estate, and, if it devolves upon death, it has always passed to the executors and administrators of the lessee, and never to his heirs. This is so notwithstanding that the term was expressly limited to the lessee and his heirs[2].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 Littleton's Tenures s 740. See also EXECUTORS AND ADMINISTRATORS; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 595.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/104. Limitation to persons in succession.

104. Limitation to persons in succession.

At law a term of years[1] could not by assurance inter vivos be limited to persons in succession. An assignment of the term vested the entire term in the assignee, notwithstanding that it purported to be made to the assignee for his life only[2]. Nor could successive interests be created inter vivos by executory assurances, as the Statute of Uses[3] did not apply to leasehold interests[4]. However, in equity successive interests in chattels real were recognised, and, if the legal term was vested in trustees, trusts of the term could be effectually declared in favour of persons in succession[5]. Such interests could also be created by will without the intervention of trustees, as the doctrine of executory devises applied to chattels real as well as to freehold property[6]. Thus, upon a devise of leaseholds to one for life with remainder to another person, the remainder was well disposed of and the disposition took effect by way of executory devise[7]; and this was so also where the devise over was in favour of a person not in being or ascertained at the date of the will or of the death of the testator[8]. The union of the life interest in the term and the freehold reversion did not effect a merger so as to destroy the executory interests in the term[9].

Interests of such a nature may be created since 1925 either by settlement inter vivos or by will, but only as equitable interests[10]. Prior to 1 January 1997, they could be created behind settlements under the Settled Land Act 1925 but since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on that date, and subject to certain exceptions, it has not been possible to create any new settlements under the 1925 Act and any such interests must instead take effect behind a trust of land under the 1996 Act[11].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 This followed from the consideration that at law personal property was regarded as the subject not of estates but of absolute ownership only; thus, whatever limitation was placed on an assignment of a chattel real, eg an assignment of a term to A for life, the absolute interest passed: 2 Preston's Abstracts of Title 5. However, a lease might be granted originally to A for years, if he so long lived, and then to B, since B's remainder took effect as a future lease: *Wright d Plowden v Cartwright* (1757) 1 Burr 282. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1227 et seq.

3 Ie the Statute of Uses (1535) (repealed): see PARA 18 note 10 ante.

4 As to the Statute of Uses (1535) and leasehold interests see PARA 21 ante.

5 See EQUITY vol 16(2) (Reissue) PARA 608.

6 See Fearne's Contingent Remainders 386, 401; 2 Preston's Abstracts of Title 4-5; and PERSONAL PROPERTY vol 35 (Reissue) PARA 1229. As to the application of the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1067. As to executory bequests of chattels personal see Fearne's Contingent Remainders 401 et seq. As to executory devises see PARA 174 et seq post.

7 *Manning's Case* (1609) 8 Co Rep 94b; *Lampet's Case* (1612) 10 Co Rep 46b; *Johns v Pink* [1900] 1 Ch 296 at 305. See also 1 Eq Cas Abr 191, pl 1n.

8 *Cotton v Heath* (1638) 1 Eq Cas Abr 191, pl 2; Fearne's Contingent Remainders 402-404. There was formerly a distinction between the bequest of the use of a chattel real for life with remainder over, which was good, and a similar bequest of the term itself in which the remainder was void; but this has long been obsolete: see Fearne's Contingent Remainders 402.

9 See Fearne's Contingent Remainders 421-422, referring to *Hammington v Rudyard* (1586) cited in 10 Co Rep at 52a.

10 See the Law of Property Act 1925 s 4(1), which authorises the creation as equitable interests of interests in land which before the commencement of that Act could, under the Statute of Uses (1535) (repealed) or otherwise, have been created as legal interests; and PARA 46 ante.

11 See the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 2; and PARA 65 ante.

105. Entailed interests in terms of years.

The rule that a term[1] may be limited by way of trust or of executory bequest to persons in succession was formerly subject to the further rule that an interest analogous to an estate tail could not be created in chattels real. Thus any words which, whether by express limitation or by implication, would create an estate tail in freeholds gave an absolute interest in chattels real[2]. The donee might accordingly dispose of them as he pleased, and, if he did not dispose of them, they went to his executors and not to his issue[3]. As from 1 January 1926 the law in this respect was altered, and entailed interests in chattels real could be created by way of trust in the same manner as in the case of real property and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and all the statutory provisions relating to estates tail in real property applied to entailed interests in leasehold property[4]. As from 1 January 1997, it has no longer been possible to create any new entailed interests[5].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 *Leventhorpe v Ashbie* (1635) 1 Roll Abr 831, pl 1. See also WILLS vol 50 (2005 Reissue) PARA 668 et seq. Thus leaseholds directed to be settled as nearly as possible in accordance with a strict settlement of realty could not be settled beyond the first tenant in tail: *Fordyce v Ford* (1795) 2 Ves 536 at 539; *Re Johnson's Trusts* (1866) LR 2 Eq 716.

3 Fearne's Contingent Remainders 461.

4 See the Law of Property Act 1925 s 130 (now amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and SETTLEMENTS. As to the law with respect to entailed interests in real property, which was thus made to apply to personal property, including chattels real, see PARA 117 post.

5 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5. Where a person purports by an instrument coming into effect on or after 1 January 1997 (1) to grant to another person an entailed interest in real or personal property, the instrument is not effective to grant an entailed interest but operates instead as a declaration that the property is held in trust absolutely for the person to whom an entailed interest in the property was purportedly granted; (2) to declare himself a tenant in tail of real or personal property, the instrument is not effective to create an entailed interest: Sch 1 para 5(1), (2).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/106. Rule in Shelley's Case.

106. Rule in Shelley's Case.

Although the rule in Shelley's Case[1] did not strictly apply to chattels real[2], the analogy of the rule was so far followed that a gift to a person for life, and after his death to the heirs of his body, vested in him the absolute interest[3]. However, if there were indications in the settlement or will that the words 'heirs of the body' were not words of limitation, but designated a particular person or persons, the donee took for life only, and the persons so designated took by purchase[4]; and, if, with like indications, the gift was to one for life and then to his issue, the result was the same, and the issue took as purchasers[5].

1 As to the rule in *Shelley's Case* (1581) 1 Co Rep 93b see PARA 172 post. The rule is now abolished: see PARA 172 post.

2 *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276 at 281; *Herrick v Franklin* (1868) LR 6 Eq 593.

3 *Garth v Baldwin* (1755) 2 Ves Sen 646 at 661; *Tothill v Pitt* (1766) 1 Madd 488 (on appeal sub nom *Earl of Chatham v Tothill* (1771) 7 Bro Parl Cas 453, HL); *Harvey v Towell* (1847) 7 Hare 231; *Lewis v Hopkins* (1856) 3 Drew 668 (on appeal sub nom *Williams v Lewis* (1859) 6 HL Cas 1013). In *Comfort v Brown* (1878) 10 ChD 146 at 151 this was treated as an actual application of the rule in *Shelley's Case* (1581) 1 Co Rep 93b. The result was not prevented by the life estate being given to a married woman for her separate use: *Earl of Verulam v Bathurst* (1843) 13 Sim 374.

4 See *Hodgeson v Bussey* (1740) 2 Atk 89; Fearne's Contingent Remainders 495. The test was whether 'heirs of the body' or other words, such as 'sons' or 'children', were to include all the heirs or sons successively or not; if all were included, the words defined the interest of the first taker: *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 208; *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 ('children in succession'); *Comfort v Brown* (1878) 10 ChD 146 ('sons successively in tail'). However, on the construction of the will, 'heirs of the body' might mean the statutory next of kin descended from the first devisee, and then they took as purchasers (*Symers v Jobson* (1848) 16 Sim 267; *Pattenden v Hobson* (1853) 17 Jur 406; *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276), and, where the context showed that the line of descent contemplated was incompatible with an estate tail, the limitations gave a life interest only to the first devisee (*Dodds v Dodds* (1860) 11 I Ch R 374, Ir CA).

5 *Knight v Ellis* (1789) 2 Bro CC 570; *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 209; *Re Andrew's Will* (1859) 27 Beav 608.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(i) Nature of the Estate/107. Rules governing limitations.

107. Rules governing limitations.

The executory devise of a term[1] and the limitation of the trusts of a term were governed by the same rules[2], and, if real and personal property were devised by the same words, these rules were followed as to the personal estate, although the consequence was that the limitations of the personal estate might have to be construed differently from those of the real estate[3].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 Fearne's Contingent Remainders 470.

3 *Jackson v Calvert* (1860) 1 John & H 235; *Herrick v Franklin* (1868) LR 6 Eq 593, disapproving *Dunk v Fenner* (1831) 2 Russ & M 557. See also *Bennett v Bennett* (1864) 2 Drew & Sm 266. Under the present law this question is not likely to arise.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(ii) Enlargement of Long Terms/108. Nature of terms capable of being enlarged.

(ii) Enlargement of Long Terms

108. Nature of terms capable of being enlarged.

In certain cases the residue of a long term[1], whether the immediate reversion is the freehold or not[2], may be enlarged into a fee simple. For this purpose the following conditions must be satisfied[3]:

50 (1) the term as originally created must have been for not less than 300 years;
51 (2) the unexpired residue must be for not less than 200 years, but this may subsist either in the whole or only part of the land originally comprised in the term[4];
52 (3) there must be no trust or right of redemption affecting the term in favour of the freeholder or other reversioner[5];
53 (4) either there must be no rent at all or merely a nominal rent (namely a peppercorn or other rent having no money value[6]) incident to the reversion; or, if there was a rent other than nominal, it must have been released, or barred by lapse of time, or in some other way have ceased to be payable[7]; and
54 (5) the term must not be either a term liable to be determined by re-entry for condition broken[8], or a term created by sub-demise out of a superior term itself incapable of being enlarged into a fee simple[9].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 See the Law of Property Act 1925 s 153(2), replacing, in part, the Conveyancing Act 1882 s 11 (repealed).

3 Law of Property Act 1925 s 153(1), replacing the Conveyancing Act 1881 s 65(1) (repealed). The earlier provision applied to terms subsisting at or after 1 January 1882: s 65(7) (repealed). This is not repeated in the Law of Property Act 1925 s 153 (as amended), and it is provided by s 154 that Pt V (ss 139-154) (as amended) is to apply to leases created before or after the commencement of the Act. See generally 22 Conveyancer and Property Lawyer (New Series) 101 et seq.

4 Law of Property Act 1925 s 153(1). See also note 3 supra.

5 See ibid s 153(1)(a). See also note 3 supra.

6 A rent of 3 shillings (*Re Smith and Stott* (1883) 29 ChD 1009n) or, apparently, 1 shilling (*Blaiberg v Keeves* [1906] 2 Ch 175), was held to be a rent having a money value; but not a rent of 'one silver penny, if lawfully demanded' (*Re Chapman and Hobbs* (1885) 29 ChD 1007, where importance was attached to the words 'if lawfully demanded').

7 See the Law of Property Act 1925 s 153(1)(b). See also note 3 supra. The reference to rents being barred by lapse of time appears to be a mistake. So long as the term subsists mere non-payment does not extinguish the rent; this can always be recovered with six years' arrears (*Grant v Ellis* (1841) 9 M & W 113; *Archbold v Scully* (1861) 9 HL Cas 360: see LIMITATION PERIODS vol 68 (2008) PARAS 1021, 1033); but a release may be presumed from non-payment for a length of time (see *Lefroy v Walsh* (1851) 1 ICLR 311; *Tennent v Neil* (1870) IR 5 CL 418, Ex Ch; *Blaiberg v Keeves* [1906] 2 Ch 175). Where a rent not exceeding £1 a year has not been collected or paid for a continuous period of 20 years or upwards, it is, for the purposes of the Law of Property Act 1925 s 153, deemed to have ceased to be payable (s 153(4)); of such period, at least five years must have

elapsed after 1925 (s 153(4) proviso); and where a rent is thus deemed to have ceased to be payable, no claim for the rent or any arrears is capable of being enforced (s 153(5)). See also note 3 supra.

8 See ibid s 153(2)(i); and see also note 3 supra.

9 See ibid s 153(2)(ii); and see also note 3 supra.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(ii) Enlargement of Long Terms/109. By whom power to enlarge may be exercised.

109. By whom power to enlarge may be exercised.

The power to enlarge a long term[1] into a fee simple can be exercised by any of the following persons as regards the land to which he is entitled, whether he is entitled subject to incumbrances or not: (1) any person beneficially entitled in right of the term to possession of any land comprised in the term and, in the case of a married woman, without the concurrence of her husband, whether or not she is entitled for her separate use, or as her separate property[2]; (2) any person in receipt of income as trustee, in right of the term, or having the term vested in him as a trustee of land[3]; and (3) any person in whom, as personal representative of any deceased person, the term is vested, whether or not subject to any incumbrance[4].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 Law of Property Act 1925 s 153(6)(i) (amended by the Married Women (Restraint upon Anticipation) Act 1949 s 1(4), Sch 2). The power was exercisable by a married woman notwithstanding a restraint on anticipation: Law of Property Act 1925 s 153(6) (as originally enacted), replacing the Conveyancing Act 1881 s 65(2) (repealed), which required the concurrence of the husband of a married woman, unless she was entitled for her separate use. As to the abolition of restraints on anticipation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 204.

3 Law of Property Act 1925 s 153(6)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3). For the meaning of 'trustee of land' see PARA 66 note 7 ante.

4 Law of Property Act 1925 s 153(6)(iii). 'Incumbrance', unless the context otherwise requires, includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum: s 205(1)(vii).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(ii) Enlargement of Long Terms/110. Exercise of power of enlargement.

110. Exercise of power of enlargement.

The power of enlargement is exercised by the execution of a deed containing a declaration that from and after execution the term[1] is to be enlarged into a fee simple[2]. Thereupon the term is enlarged accordingly, and the person in whom the term was previously vested has a fee simple in the land instead of the term[3]; but this estate in fee simple is subject to the same trusts, powers, executory limitations over, rights and equities, and to the same covenants and provisions as to user and enjoyment, and to all the same obligations of any kind, as the term would have been subject to if not enlarged[4]. Such estate includes the fee simple in all mines and minerals[5] which, at the time of enlargement, have not been severed in right or in fact, or have not been severed or reserved under an Inclosure Act[6] or award, from the surface[7].

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

2 See the Law of Property Act 1925 s 153(6).

3 Ibid s 153(7).

4 Ibid s 153(8).

5 For the meaning of 'mines and minerals' see PARA 77 note 5 ante.

6 As to the Inclosure Acts generally see COMMONS vol 13 (2009) PARA 418 et seq.

7 See the Law of Property Act 1925 s 153(10). See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 20.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(ii) Enlargement of Long Terms/111. Limitations of estate so enlarged.

111. Limitations of estate so enlarged.

Where the land has been settled in trust by reference to freehold land so as to go along with the freehold land, or, in the case of settlements coming into operation before 1 January 1926[1], so as to go along with it so far as the law permits[2], and no person has become absolutely entitled to the term[3], free from charges or powers of charging created by a settlement[4], the fee simple acquired by enlargement of the term is, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, to be conveyed by a subsidiary vesting instrument[5] and settled in like manner as the freehold land, and in the meantime it will devolve beneficially as if it had been so conveyed and settled[6].

1 Ie the date of commencement of the Law of Property Act 1925: see s 209(2) (repealed).

2 Ibid s 153(9)(a).

3 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

4 See the Law of Property Act 1925 s 153(9)(b). Cf the Settled Land Act 1925 s 3 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 708. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

5 As to subsidiary vesting instruments see the Settled Land Act 1925 s 10; and SETTLEMENTS vol 42 (Reissue) PARA 691.

6 Law of Property Act 1925 s 153(9).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(iii) Satisfied Terms/112. Nature and purpose of long terms.

(iii) Satisfied Terms

112. Nature and purpose of long terms.

Long terms of years[1] are created for the purpose of securing the payment of money. Formerly this was usually done in connection with the provision of jointure rentcharges and portions under settlements[2]. The owner of the estate for the time being usually kept down the jointure rentcharges out of the income of the estate, and paid off the portions by himself raising money on the estate or from other sources; but, if he failed to do so, the trustees in whom the terms were vested could enter into possession of the estate and themselves pay the rentcharges out of income or raise the portions by mortgage or sale of the term. Generally it was not necessary to sell the term, and in due course the purposes for which it was created were satisfied; but before 1846 this did not necessarily mean that the term came to an end. It might be useful as a protection against incumbrances, and accordingly it was often kept on foot with this object and, upon a sale of land, the purchaser had it assigned to a trustee for himself. Thereupon it became attendant on the inheritance, and in the event of any subsequent incumbrances being asserted, it might be set up to defeat them[3].

It is not the practice since 1925 to create terms of years for the protection of jointures and portions, but, although settlement terms are less usual than formerly, a long term of years is now a necessary part of a legal mortgage of freeholds[4], unless made by legal charge[5], and a mortgage term becomes a satisfied term, so soon as the principal mortgage money with interest and costs has been paid so that the mortgage term is no longer required as a security.

1 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq. As to the enlargement of long terms see PARA 108 et seq ante.

2 As to portions under settlements see SETTLEMENTS.

3 See the *Second Report of Commissioners on the Law of Real Property* (1830) 8 et seq; Williams on the Law of Real Property (24th Edn) 648-649; Sugden's Vendors and Purchasers (14th Edn) 615 et seq. A term attendant upon the inheritance devolved with the freehold upon which it was attendant, and not as personalty: see PARA 2 note 7 ante; and *Re Sergie, Shribman v Hall* [1954] NI 1, NI CA.

4 See the Law of Property Act 1925 s 85(1); and MORTGAGE vol 77 (2010) PARA 190.

5 As to legal charges see MORTGAGE vol 77 (2010) PARA 191.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/3. LEGAL ESTATES/(2) ESTATE FOR YEARS/(iii) Satisfied Terms/113. Statutory extinction of satisfied terms.

113. Statutory extinction of satisfied terms.

The continued existence of satisfied terms is now prevented by statute[1]. Where the purposes of a term of years[2] created or limited out of freehold land become satisfied at any time (whether or not that term either by express declaration or by construction of law becomes attendant on the freehold reversion), it merges in the reversion and ceases accordingly[3], and similar provision is made with respect to a term of years created or limited out of leasehold land which becomes satisfied after 31 December 1925[4]. A term is not satisfied within the meaning of the statute so long as there remains any useful purpose beneficial to the owner of the term and consistent with the trust on which, at the date of the transaction, the term was held[5]; and, although a mere attendant term is merged, it is not so if the lessee has made it a security for money, and by the mortgage deed clothed it with an active trust in favour of the mortgagee[6]. Where the term and the reversion would merge, the owner can still perhaps, by expressing his intention to that effect, keep the term alive as personal estate so that it will pass under a testamentary gift of all the owner's personal property[7]. As to mortgage terms, it is provided that, without prejudice to the right of a tenant for life or other limited owner of the equity of redemption to require a mortgage to be kept alive by transfer or otherwise, a mortgage term,

when the money secured by the mortgage has been discharged, becomes a satisfied term and then ceases[8].

1 Ie by the Law of Property Act 1925 s 5, replacing the Satisfied Terms Act 1845 s 2 (repealed).

2 As to a term of years and for the meaning of 'term of years absolute' see PARA 101 ante; and see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 235 et seq.

3 Law of Property Act 1925 s 5(1). Where the purposes are satisfied only as respects part of the land comprised in a term, s 5 has effect as if a separate term had been created in regard to that part of the land: s 5(3).

4 Ibid s 5(2); and see note 3 supra. The Satisfied Terms Act 1845 (repealed) did not apply to terms created out of leaseholds: *Re Moore and Hulm's Contract* [1912] 2 Ch 105. As to the transitional provisions relating to satisfied sub-terms see PARA 51 ante.

5 *Anderson v Pignet* (1872) 8 Ch App 180 at 188 per Lord Selborne LC. A term expressly assigned in trust for parties supposed, by mistake, to be entitled to the inheritance was not extinguished by the statute; in such a case it was not attendant either by express declaration or by construction of law: *Doe d Clay v Jones* (1849) 13 QB 774.

6 *Shaw v Johnson* (1861) 1 Drew & Sm 412 at 416; *Anderson v Pignet* (1872) 8 Ch App 180.

7 *Belaney v Belaney* (1867) 2 Ch App 138. See also MORTGAGE vol 77 (2010) PARA 101 et seq.

8 Law of Property Act 1925 s 116. Only a person with a limited interest can keep the mortgage alive as against a subsequent incumbrancer; the mortgagor or person deriving title under him cannot: see ss 115(3), 205(1)(xvi). See further MORTGAGE vol 77 (2010) PARAS 117, 642.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(1) DETERMINABLE FEES/114. Estates upon condition and determinable fees.

4. EQUITABLE INTERESTS

(1) DETERMINABLE FEES

114. Estates upon condition and determinable fees.

Estates in fee may be created subject to certain modifications, and these give rise to estates upon condition and determinable fees. Since such estates are not absolute, they do not prima facie conform to the test of a legal estate[1]. However, estates upon condition, being estates subject to an express or implied power of entry, are, for special reasons, deemed to be absolute and may exist as legal estates[2]. Thus the determinable fee is the only modified fee which cannot exist as a legal estate[3]. Prior to 1 January 1997, any instrument under or by virtue of which a determinable fee was created would be a settlement under the Settled Land Act 1925[4]. Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, and subject to certain exceptions, it has not been possible to create any new settlements under the Settled Land Act 1925 so that any new determinable fee would now have to take effect behind a trust of land[5].

1 See the Law of Property Act 1925 s 1(3); and PARA 46 ante. For the meaning of 'legal estate' see PARA 47 ante.

2 As to estates in fee upon condition see PARA 97 et seq ante. The estates which are called in the text 'fee simple upon condition' are sometimes called 'fee simple conditional', but that expression is liable to be confused with conditional fees (as to which see PARA 117 post). Conditional fees were, as regards freehold lands, turned into estates tail by 13 Edw 1 (Statute of Westminster the Second) (1285) c 1, but they might still exist as

regards other hereditaments, such as personal annuities, since these were not within the statute: *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170; 2 Bl Com (14th Edn) 154. It appears moreover that in manors where there was no custom to entail, a grant of copyhold land to the grantee and the heirs of his body gave a customary fee and was construed by the analogy of conditional fees at common law: see Challis's Law of Real Property (3rd Edn) 62. Conditional fees of this nature are now obsolete. Moreover, no further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARA 105 ante.

3 There was another form of modified fee known as a 'qualified fee simple'. In lieu of limiting an estate to a man and his heirs, the estate might be specially limited to a man and the heirs of an ancestor whose heir he was: Challis's Law of Real Property (3rd Edn) 269. Probably the limitation only controlled the original course of descent and did not place any restriction on the power of alienation. Thus, the owner for the time being could alienate like the owner of an estate in fee simple absolute and vest a fee simple absolute in the alienee: see Challis's Law of Real Property (3rd Edn) 278-280. Such limitations were probably obsolete before 1926, and under the Law of Property Act 1925 s 132(1) the specified heir could not take under the limitation by descent, but only as purchaser under the gift in his favour. Consequently, a qualified fee simple could not now subsist. See further EXECUTORS AND ADMINISTRATORS. As to base fees, which are estates in fee simple although they cannot be created by limitation, see PARA 134 et seq post.

4 See the Settled Land Act 1925 s 1(1) (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 678.

5 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(1); and PARA 65 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(1) DETERMINABLE FEES/115. Fees determinable on happening of future event.

115. Fees determinable on happening of future event.

An estate in fee may be granted with words of direct limitation[1] so as to be prima facie a fee simple, but with further words, sometimes called words of collateral limitation[2], by which it is liable to be determined on the happening of some future event, provided that this is of such a nature that by possibility it may never happen at all[3]. An estate so limited is called a 'determinable fee'[4], and since it does not confer an absolute estate, it is an equitable interest[5]. Since the possible duration of the estate exhausts the fee, no remainder can be limited upon it, and the grantor retains only a possibility of reverter[6]. In the case of instruments which took effect on or before 16 July 1964, this possibility of reverter is probably exempt from the rule against perpetuities, and it is therefore no objection that the future event may happen at a time beyond the limit allowed by the rule[7]. However, in the case of instruments taking effect after that date, the rule against perpetuities has been made applicable by statute[8] and if the possibility of reverter falls to be treated as void for remoteness the determinable fee becomes absolute[9].

If the future event is such that it will always remain liable to happen[10], the determinable fee can only be enlarged into a fee simple absolute by release of the possibility of reverter, or (where applicable) by the effect of the rule against perpetuities[11]. If the future event is such that it may become impossible to happen[12], then, upon such impossibility being ascertained, the possibility of reverter is extinguished, and the determinable fee is enlarged into a fee simple absolute[13]. If the event happens, the estate is thereby determined by force of the collateral limitation, without entry by the grantor or his heirs, that is, now the persons deriving title under him[14].

1 As to the duration of the estate see PARA 92 ante.

2 See 1 Preston on Estates 42, and Challis's Law of Real Property (3rd Edn) 252.

3 1 Preston on Estates 479. Where the event must happen, the estate is a freehold inferior in quantum to a fee simple, if the event is to happen at an uncertain time, eg on the falling of a life, so as to make the estate an estate pur autre vie; if the event is to happen at a fixed time, the estate is a chattel real: Challis's Law of Real Property (3rd Edn) 251. See also Littleton's Tenures s 740.

4 The possibility of such estates is recognised by the Settled Land Act 1925 ss 1(1)(ii), 20(1)(iii), 117(1)(iv) (s 1(1)(ii) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(1), (2)). See also Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 335 et seq. Coke calls the estate a fee simple limited and qualified (*Seymor's Case* (1612) 10 Co Rep 95b); Preston calls it a determinable fee (1 Preston on Estates 443); and Butler calls the estate a limited fee (Fearne's Contingent Remainders 382n), and the limitation a conditional limitation (see 10n). The term 'conditional limitation' is, however, more conveniently confined to shifting uses and executory devises (both of which can now take effect only by way of trust) in which the ultimate limitation is really conditional: see Gray's Rule against Perpetuities (4th Edn) s 32. For words suitable for introducing the collateral limitation see *Portington's Case* (1613) 10 Co Rep 35b at 41b; Co Litt 234b; *Re Machu* (1882) 21 ChD 838 at 843; and Challis's Law of Real Property (3rd Edn) 255-260. It has been suggested that a determinable fee is impossible since 18 Edw 1 (Quia Emptores) (1289-90) c 1: see 1 Sanders on Uses and Trusts (5th Edn) 208; Gray's Rule against Perpetuities (4th Edn) s 33; and the discussion as to determinable fees in trustees in *Collier v Walters* (1873) LR 17 Eq 252 at 261. However, this view has been questioned: see Challis's Law of Real Property (3rd Edn) 437; 2 LQR 394. See also Gray's Rule against Perpetuities (4th Edn) s 774 (Appendix E); *Hopper v Liverpool Corpn* (1944) 88 Sol Jo 213, where the authorities are reviewed. In practice the object of determinable fees was attained by shifting uses and executory devises, and these were more effectual because the substituted estates could be limited to third persons. The examples of determinable fees given in Challis's Law of Real Property (3rd Edn) 255-260 include many instances of shifting uses and executory devises. See also *A-G v Cummins* (1895) [1906] 1 IR 406; *Re Leach, Leach v Leach* [1912] 2 Ch 422 at 427.

5 See the Law of Property Act 1925 s 1(3); and PARA 46 ante.

6 Co Litt 18a; Challis's Law of Real Property (3rd Edn) 83.

7 Gray's Rule against Perpetuities (4th Edn) s 312; *A-G v Cummins* (1895) [1906] 1 IR 406. Cf *Re Chardon, Johnston v Davies* [1928] Ch 464; but see *Hopper v Liverpool Corpn* (1944) 88 Sol Jo 213, where the Chancery Court of Lancaster decided to the contrary. The principle is either that possibilities of reverter are older than the rule against perpetuities and are subject only to the common law, or that the collateral limitation determines, but does not originate, an estate. The latter is probably the better reason, but since the future event may never happen, the possibility of reverter would seem to be a contingent interest, and, as such, subject to the rule against perpetuities. See further note 14 infra; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1040.

8 See the Perpetuities and Accumulations Act 1964 ss 12, 15(5). The application of the rule against perpetuities is effected by treating the provision causing the fee to be determinable as if it were a condition subsequent: see s 12(1). As to a fee simple upon condition see PARAS 97-99 ante. See further PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1040.

9 See ibid s 12(1).

10 Eg where land was granted to A and his heirs so long as B had heirs of his body, this was in effect a base fee; or so long as the Church of St Paul should stand: Plowd 557.

11 As to the effect of the rule against perpetuities see the text to notes 7-9 supra.

12 Eg until the marriage of a specified person; if the person dies unmarried the estate is enlarged into a fee simple absolute: 1 Preston on Estates 432, 442; Challis's Law of Real Property (3rd Edn) 256; *Re Leach, Leach v Leach* [1912] 2 Ch 422. However, such limitations were made by shifting use: see generally para 179 et seq post.

13 Challis's Law of Real Property (3rd Edn) 254. In that event the person entitled to the fee simple absolute could require the legal estate to be vested in him: see the Settled Land Act 1925 s 7(5) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 2(1), (4)).

14 It was generally assumed that the determination was in favour of the grantor and his heirs, and this was implied in the phrase 'possibility of reverter'. However, the view was advanced that, since 18 Edw 1 (Quia Emptores) (1289-90) c 1 (see PARA 7 ante), the absence of tenure between grantor and grantee gave the benefit of the reverter to the lord as a quasi-escheat: see 2 LQR 394; Gray's Rule against Perpetuities (4th Edn) s 774 (Appendix E). The abolition of escheat by the Administration of Estates Act 1925 s 45 only extends to escheat for want of heirs (see PARA 254 note 2 post), so that this view is still tenable; but since 1926 a determinable fee can only exist as an equitable interest, and generally there is no escheat of equitable interests: *Burgess v Wheate* (1759) 1 Eden 177.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(1) DETERMINABLE FEES/116. Powers of owner of determinable fee.

116. Powers of owner of determinable fee.

At common law there was no rule forbidding waste by the owner of a determinable fee[1], but it seems that he may be restrained from committing equitable waste[2]. Subject to this, the owner of a determinable fee which takes effect under the Settled Land Act 1925[3] has the same rights of actual enjoyment as an owner in fee simple absolute[4]. As regards alienation, he has the powers of a tenant for life[5], but he cannot deal with the legal estate until it has been vested in him by vesting instrument[6].

1 *Bowles's Case* (1615) 11 Co Rep 79b at 81a.

2 This follows from the fact that there is some other person interested in expectancy. Cf *Re Hanbury's Settled Estates* [1913] 2 Ch 357 at 365.

3 See PARA 114 ante. In the case of a determinable fee created on or after 1 January 1997, the legal title to the land will be vested in the trustees of land: see PARAS 65-66 ante.

4 As to the rights of user of an owner in fee simple see PARA 94 ante.

5 See the Settled Land Act 1925 s 20(1)(iii); and SETTLEMENTS vol 42 (Reissue) PARA 762.

6 See ibid s 13 (amended by the Law of Property (Amendment) Act 1926 ss 6, 7, Schedule); and SETTLEMENTS vol 42 (Reissue) PARA 702.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(i) Origin, Creation and Classification/117. Origin of estate tail.

(2) ENTAILED INTERESTS

(i) Origin, Creation and Classification

117. Origin of estate tail.

Estates tail, now sometimes called entailed interests, arose from the operation of the Statute of Westminster the Second[1] on conditional fees at common law[2].

At common law a limitation to a man and a special class of heirs, such as the heirs male of his body by a specified wife, was a conditional fee simple[3]. The condition was performed by the birth of issue of the prescribed class, and thereafter the grantee had a fee simple absolute for the purpose of alienation[4]; but if he died without having alienated the land the form of the gift was observed and it followed the prescribed course of descent[5]. The statute[6] enacted that the will of the grantor according to the form of the grant should thereafter be observed, so that the grantee of the land under such a condition should have no power to alienate the land[7], but that it should remain to the issue after the death of the grantee, or should revert to the grantor or his heirs on failure of the prescribed issue of the grantee, whether because there was no such issue or because, after issue born, the line of issue failed. Therefore, the statute prevented the estate from ever becoming a fee simple absolute and converted it into an estate of inheritance of a restricted nature, from which the estate was called feodum talliatum, or an estate tail[8].

Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new entailed interests[9].

1 Ie 13 Edw 1 (Statute of Westminster the Second) (1285) c 1. See also Digby's History of the Law of Real Property (5th Edn) 226.

2 Estates tail could only be created in copyhold land if there was a custom of entail in the particular manor, and could not before 1926 be created in leaseholds at all: see PARA 105 ante.

3 *Willion v Berkley* (1561) 1 Plowd 223 at 252; 2 Pollock and Maitland's History of English Law (2nd Edn) 17-19; Challis's Law of Real Property (3rd Edn) 263; 3 Holdsworth's History of English Law 111 et seq. See also PARA 114 note 2 ante.

4 The grantee had a fee simple also for the purpose of forfeiture and for the purpose of charging the land with rent, common or the like: Co Litt 19a. If the grantee alienated before issue born, this barred the issue afterwards born, but it did not bar the grantor's possibility of reverter, and he could re-enter if the issue died without issue: Co Litt 19a.

5 Co Litt 19a.

6 Ie 13 Edw 1 (Statute of Westminster the Second) (1285) c 1. The several kinds of estate tail enumerated in the statute are not exhaustive but are only examples: *Elliot v Elliot* [1916] 1 IR 30.

7 *A-G v Duke of Marlborough* (1818) 3 Madd 498 at 532.

8 Littleton's Tenures s 18; Co Litt 22a. However, an estate tail still resembles a fee simple in that it is exempt from liability for waste: see *Bowles's Case* (1615) 11 Co Rep 79b, 4th resolution.

9 Trusts of Land and Appointment of Trustees Act 1996 ss 2(6), 27(2), Sch 1 para 5. See further PARA 119 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(i) Origin, Creation and Classification/118. Classification.

118. Classification.

An estate in tail in its widest form is where land or tenements are limited to a man and the heirs of his body without restriction as to the wife of whom the heirs are to be born or of the sex of the heirs[1], and similarly where the limitation is to a woman and the heirs of her body[2]. Such an estate is called an 'estate in tail general'. However often the donee in tail is married, his or her issue of every such marriage, whether male or female, are, in successive order, capable of inheriting under the entail; so that elder sons and their issue will inherit in order before younger sons; sons and their issue will inherit before daughters and their issue; and daughters will inherit equally among themselves, the issue of each daughter taking her share[3].

An estate in tail general may be restricted to heirs male or heirs female, and is called, accordingly, an 'estate in tail male general'[4], or an 'estate in tail female general'[5]. Under a limitation in tail male general only male issue claiming continuously through male issue can inherit, and under a limitation in tail female general only female issue claiming continuously through female issue can inherit[6]. However, the second limitation does not occur in practice, since a limitation in tail male followed by a remainder in tail female does not exhaust the possible issue[7]; the appropriate remainder after a limitation in tail male is a limitation in tail without restriction of sex[8].

An estate in tail may be restricted to the heirs of the body of two specified persons, and then it is known as an 'estate in tail special'[9]. This may be, first, where the limitation is to a single donee and the heirs of his or her body by a specified wife or husband; and, secondly, where the limitation is to a man and woman who are either married or are capable of lawful marriage. In

the first case, the donee has an estate in tail special[10]; in the second case, the donees have a joint estate in tail special[11]. An estate in tail special may be further restricted in the same way as an estate in tail general to male heirs of the body or female heirs of the body[12].

1 Littleton's Tenures s 14. An estate tail, although it now takes effect as an entailed interest and is so referred to in the Law of Property Act 1925 s 130 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4), may still be properly described by its former name. It remains an 'estate', although now an equitable estate, and it is convenient to call it so when its connection with the former law is material: see Williams on the Law of Real Property (24th Edn) 129-130. It is, of course, an anachronism to speak of an entailed interest in real property under the law before 1926. The expression 'estate tail' can also be used as regards chattels real, although it is not appropriate in the case of other personalty. See further PARA 144 note 3 post.

2 Littleton's Tenures s 15.

3 2 Bl Com (14th Edn) 113. With regard to descent to heirs, the same rules apply as in the case of descent of an estate in fee simple before 1926, subject to the restriction of the line of inheritance to heirs of the body: see EXECUTORS AND ADMINISTRATORS. As to descent to daughters see PARA 224 et seq post. The Inheritance Act 1833 still applies for the purpose of ascertaining the devolution of an entailed interest: Law of Property (Amendment) Act 1924 s 9, Sch 9 para 1.

4 Littleton's Tenures s 21.

5 Littleton's Tenures s 22.

6 Thus, under a limitation in tail male, the son of a daughter cannot inherit, nor, under a limitation in tail female, the daughter of a son: Littleton's Tenures s 24; Co Litt 25a, 25b.

7 Thus, in a limitation in tail male with remainder in tail female, if the donee has issue a son, who has issue a daughter, who has issue a son, neither of the last two is included: Co Litt 25b.

8 'The safest way, when a man will entail his lands to the heirs male and female of his body, is to limit the first estate to him and the heirs male of his body, the remainder to him and to the heirs of his body, and then all his issues whatsoever are inheritable': Co Litt 25b. However, if land is given to a man and to the heirs male or female of his body, this is an estate in tail general: Co Litt 25b. See also PARA 120 note 9 post; and Challis's Law of Real Property (3rd Edn) 287.

9 Littleton's Tenures s 16.

10 Littleton's Tenures s 29.

11 Littleton's Tenures s 16; Co Litt 20b. See also PARA 191 post. If the gift is to husband and wife and to the heirs of the body of the husband, the husband has an estate in tail general and the wife an estate for life: Littleton's Tenures s 26. See also Littleton's Tenures ss 27, 28.

12 Littleton's Tenures s 25. An estate tail may be limited to a man and the heirs of his body other than the eldest son: *Elliot v Elliot* [1916] 1 IR 30.

119. Creation after 1925 and before 1997.

Before 1926 an estate tail could be created by deed only by the use of the proper words of limitation[1]; but a more liberal construction of executory instruments and wills was permitted, and in these any expression which indicated an intention to create an estate of inheritance which would descend to lineal, as distinct from collateral, heirs was construed as creating an estate tail[2]. However, after 1925 an interest in tail, or in tail male or in tail female or in tail special, could be created only by the like expressions as those by which before 1926 a similar

estate tail could have been created by deed (not being an executory instrument)[3]. Expressions which in a will or executory instrument would formerly have been construed as creating an estate tail, although they would not have been sufficient for the purpose in a deed which was not an executory instrument, instead operated in equity to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created in it by similar expressions before 1926[4].

Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new entailed interests. Where a person purports by an instrument coming into operation on or after that date to grant to another person an entailed interest in real or personal property, the instrument is not effective to grant an entailed interest, but operates instead as a declaration that the property is held in trust absolutely for the person to whom an entailed interest in the property was purportedly granted[5]. Similarly, where a person purports by an instrument coming into operation on or after 1 January 1997 to declare himself a tenant in tail in real or personal property, the instrument is not effective to create an entailed interest[6].

1 As to words of limitation see generally the text and notes 3-4 infra; and PARA 120 post. After 1881, alternative words of limitation were effective to create an estate tail, and it was sufficient to use the words 'in tail' without the words 'heirs of the body'; and, in the limitation of an interest in tail male or in tail female, to use the words 'in tail male' or 'in tail female', as the case required, without the words 'heirs male of the body' or 'heirs female of the body': see the Law of Property Act 1925 s 60(4) (as originally enacted) replacing the Conveyancing Act 1881 s 51 (repealed). See also Challis's Law of Real Property (3rd Edn) 297. As from 1 January 1997, the Law of Property Act 1925 s 60(4) is amended by the Trusts of Land and Appointment of Trustees Act 1996 ss 25(2), 27(2), Sch 4.

2 See *Lord Glenorchy v Bosville* (1733) Cas *temp* Talb 3 at 9; *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543. As to the distinction between marriage articles and wills see *Blackburn v Stables* (1814) 2 Ves & B 367 at 369-370 per Grant MR; *Sackville-West v Viscount Holmesdale* supra at 571-572. See generally TRUSTS vol 48 (2007 Reissue) PARA 735; WILLS vol 50 (2005 Reissue) PARA 668 et seq.

3 See the Law of Property Act 1925 s 130(1) (repealed), whereunder an interest in tail could be created in any property, real or personal, so that it could be created not only in freehold property but also in leasehold property and other forms of personal property: see PERSONAL PROPERTY vol 35 (Reissue) PARA 1230. It could be created only by way of trust (see PARA 46 ante); but the like results followed, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee (see PARA 121 et seq post), as would have followed from the creation of a legal estate tail before 1926: see s 130(1) (repealed).

4 Ibid s 130(2) (repealed). See further PERSONAL PROPERTY vol 35 (Reissue) PARA 1230.

5 Trusts of Land and Appointment of Trustees Act 1996 ss 2(6), 27(2), Sch 1 para 5(1).

6 Ibid ss 2(6), 27(2), Sch 1 para 5(2).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(i) Origin, Creation and Classification/120. Creation of estate tail at common law.

120. Creation of estate tail at common law.

The appropriate way of creating an estate tail was to limit the land to the donee and the heirs of his body[1]. The use of the word 'heirs', either expressly in the limitation of the estate or by reference to some other limitation in which it is used[2], was, before 1882, essential if the estate was created by deed. It could not be supplied by other words, such as 'issue' or 'seed', which, although they denote the relation of ancestor and descendant, do not specifically point to capability of inheritance[3]. However, the use of the words 'of the body' was not essential, and it was sufficient if any words were used which expressly or by implication denote that the heirs

were to issue from the body of the donee. Thus, an estate tail was created by a limitation to the donee and 'the heirs of his flesh', or 'from him proceeding'[4].

A limitation to the grantee and his heirs, giving prima facie a fee simple, was cut down to an estate tail if words were added which showed that 'heirs' meant 'heirs of the body', where, for example, there was a gift over if the grantee died 'without heirs of his body'[5]; or where the gift over was in favour of a person who was capable of being collateral heir and it was to take effect if the first grantee died 'without heirs'[6]; or where the event on which the gift was to take effect depended on the existence of a collateral heir of the first grantee on his death[7]; and perhaps a gift over if the grantee died 'without issue' restricted his prima facie fee simple to an estate tail[8].

The variations in the limitation of estates tail required to create estates in tail special, and estates in tail male or female, whether in tail general or special, followed from the nature of those estates. The addition to 'heirs' of the word 'male' or 'female' created an estate in tail male or tail female[9], and the specification, in a limitation to the donee and the heirs of his or her body, of the wife on whose body they were to be begotten, or the husband by whom they were to be begotten, created an estate in tail special[10]; but the spouse who made the entail special did not need to be particularly named, and it was sufficient if he or she was defined as belonging to a class[11]. Where the limitation was to a husband and wife as the donees, the estate tail vested in the husband or wife or both according as the issue were to proceed from one or both[12]. An estate tail might be created by a limitation to the heirs of the body of a deceased person, the first of such heirs who became entitled taking by purchase[13]; and by a limitation to an only son and the heirs of the body of his father who was then dead, the son taking an estate tail which on his death without issue would go to the next heir of the body of the father[14].

1 More fully the limitation was 'to the donee and the heirs of his body begotten'. A limitation to A 'and the heirs of his body' was as good as to 'his heirs of his body': Co Litt 26a. See also Challis's Law of Real Property (3rd Edn) 295, and cf para 93 note 3 ante. However, the limitation was good without the word 'begotten', and when this word was used it was indifferent in what tense it was expressed. Thus, a limitation 'to the donee and the heirs of his body whom he has begotten' extended to issue begotten afterwards, and a limitation to him 'and the heirs of his body to be begotten' extended to issue already begotten (Co Litt 20b; *Hebblethwaite v Cartwright* (1734) Cas *temp* Talb 31 at 32; *Doe d James v Hallett* (1813) 1 M & S 124; *Gabb v Prendergast* (1855) 1 K & J 439 at 442), but earlier born issue were excluded if such an intention was shown (*Anon* (1584) 3 Leon 87; *Locke v Dunlop* (1888) 39 ChD 387, CA; and see *Doe d James v Hallett* supra). Compressed limitations might be expanded so as to produce the intended result: *Giltrap and Earl v Earl and Nixon* [1919] 1 IR 53.

2 Thus, a limitation to A and the heirs of his body, remainder to B in similar manner created an estate tail in remainder in B: Co Litt 20b. As to confirmation by statute of an estate tail already created see *Goodright d Burton v Rigby* (1792) 2 Hy Bl 47 at 62; affd (1793) 5 Term Rep 177, HL.

3 Since fee tail is a fee simple at common law, the word 'heirs' was as essential to the limitation in a deed as it was in the case (see PARA 93 ante) of a limitation in a fee simple: Co Litt 20a, 20b; *Nevill v Nevill* (1619) 1 Brownl 152; *Seagood v Hone* (1634) Cro Car 366; *Makepiece v Fletcher* (1734) Com 457; *Wheeler v Duke* (1832) 1 Cr & M 210; *Dawson v Dawson* (1850) 13 ILR 472; *Phillips v James* (1865) 2 Drew & Sm 404 at 411 (affd 3 De GJ & Sm 72). However, a grant in frankmarriage (ie a gift to a man and his wife (a near relation of the donor) by the words 'in frankmarriage', which were words of art) created an estate tail without the word 'heirs': Littleton's Tenures s 17; Co Litt 21b; Challis's Law of Real Property (3rd Edn) 293. Possibly, in the case of an estate tail, an exception is allowed to the rule applicable to estates in fee simple, namely, that in a deed (apart from statute: see PARA 93 ante) the word 'heirs' in the plural is essential (Co Litt 22a; *Dubber d Trollope v Trollope* (1734) Amb 453 at 457; *Warrick v Warrick* (1745) 3 Atk 291; *Chambers v Taylor* (1836) 2 My & Cr 376 at 387); although in a will the singular number is sufficient (*Richards v Lady Bergavenny* (1695) 2 Vern 324; *White v Collins* (1718) Com 289; *Dubber d Trollope v Trollope* supra; and see PARA 93 note 3 ante). In applying the rule in *Shelly's Case* (1581) 1 Co Rep 93b (now abolished) (see PARA 172 post), words of limitation added to the word 'heir' made it a word of purchase: *Archer's Case* (1597) 1 Co Rep 66b; *Bayley v Morris* (1799) 4 Ves 788; *Chambers v Taylor* supra. As to wills see also *Re Simcoe, Vowler-Simcoe v Vowler* [1913] 1 Ch 552; *Silcocks v Silcocks* [1916] 2 Ch 161; para 172 note 13 post; and WILLS vol 50 (2005 Reissue) PARA 668.

4 Co Litt 20b; *Beresford's Case* (1607) 7 Co Rep 41a; *Idle v Cooke* (1705) 2 Ld Raym 1144 at 1153; *Jack d Westby v Fetherstone* (1829) 2 Hud & B 320; *Re Miller, Bailie v Miller* [1914] 1 Ch 511. Cf *Cotton's Case* (1591) 1 Leon 211, sub nom *Smy v June* Cro Eliz 219, where there were no words equivalent to 'of the body', and an

estate tail was not created. An estate tail has been created by a limitation to 'heirs male' without 'of the body' where there were circumstances showing that these words should have formed part of the limitation: *Gilmore v Harris* (1693) Carth 292.

5 Co Litt 21a.

6 Fearne's Contingent Remainders 467; *Doe d Littledale v Smeddle* (1818) 2 B & Ald 126; *Wall v Wright* (1837) 1 Dr & Wal 1; *Re Smith's Estate* (1891) 27 LR Ir 121; *Re Waugh, Waugh v Cripps* [1903] 1 Ch 744.

7 *Re Waugh, Waugh v Cripps* [1903] 1 Ch 744 at 747.

8 See *Canon's Case* (1558) 3 Leon 5; *Boreton v Nicholls* (1632) Cro Car 363; *Leigh v Brace* (1696) Carth 343. The last decision did not turn on the limitation being by way of use: see *Fisher v Wigg* (1700) 1 P Wms 14 at 15; *Bamfield v Popham* (1703) 1 P Wms 54 at 57 note (2) per Wright, Lord Keeper; *Tapner d Peckham v Merlott* (1739) Willes 177 at 181; *Smith v Smith* (1856) 5 I Ch R 88; *Morgan v Morgan* (1870) LR 10 Eq 99. However, the construction was different where the words were 'in default of such issue' (*Idle v Cooke* (1705) 2 Ld Raym 1144), or if the grantee died 'without leaving issue' (*Olivant v Wright* (1878) 9 ChD 646); and, since there appears to be no substantial ground of distinction, it may be that the cases first cited would not be followed. A reference to death without issue did not enlarge an express estate for life to an estate tail: *Seagood v Hone* (1634) Cro Car 366. As to implication of an estate tail arising upon a devise over after a failure of issue of the first devisee see, in the case of wills before the Wills Act 1837, *Gardner v Sheldon* (1671) Vaugh 259; *Parr v Swindels* (1828) 4 Russ 283; *Key v Key* (1853) 4 De GM & G 73; *Atkinson v Holtby* (1863) 10 HL Cas 313; *Eastwood v Avison* (1869) LR 4 Exch 141; and, in the case of wills since the Wills Act 1837 see s 29 (amended by the Statute Law Revision (No 2) Act 1888); and WILLS vol 50 (2005 Reissue) PARAS 740-741. As to implication of an estate tail upon a devise to the devisee and his children or issue where he had no issue at the time of the devise see *Wild's Case* (1599) 6 Co Rep 16b. A devise to A and his heirs with a proviso that neither he nor his heirs to the third generation were to sell or mortgage the land created an estate tail: *Mortimer v Hartley* (1851) 3 De G & Sm 316. See also *Hamilton v West* (1846) 10 I Eq R 75; *Dodds v Dodds* (1860) 11 I Ch R 374, Ir CA.

9 As to estate in tail male or tail female see PARA 118 ante. A limitation to heirs of the body, males to be preferred before females, created an estate in tail male in the first instance: *Denn d Creswick v Hobson* (1770) 2 Wm Bl 695.

10 Littleton's Tenures s 29. A limitation to the 'right heirs' of a man by a particular wife 'for ever' was the same as a limitation to the heirs of his body by the particular wife, and created an estate tail, notwithstanding the words 'for ever': *Wright v Vernon* (1854) 2 Drew 439; affd sub nom *Vernon v Wright* (1858) 7 HL Cas 35.

11 *Page v Hayward* (1705) 2 Salk 570, more fully reported in Pigott on Recoveries 176 ('devise to Mary Bryant and the heirs male of her body, provided she intermarries with and has issue male by one surnamed Searle'); *Pelham-Clinton v Duke of Newcastle* [1902] 1 Ch 34, CA (affd [1903] AC 111, HL) (devise to 'Charles, if he marries a fit and worthy gentlewoman, and his issue male'); *Magee v Martin* [1902] 1 IR 367 at 370, Ir CA (devise to A, and no person to inherit 'unless a lawful issue of a male child got by marriage with a respectable protestant female, of proper conducted parents'). In all three cases an estate in special tail male was created.

12 In a limitation to husband and wife and to the heirs whom the husband was to beget on the body of the wife, or to the heirs of the body of the husband and wife, there was no distinction between husband and wife as the source of issue, and the estate in special tail vested in both: Littleton's Tenures s 28; *Denn d Trickett v Gillot* (1788) 2 Term Rep 431; *Williams v Williams* (1810) 12 East 209. However, where the limitation was to husband and wife and the heirs of the body of the husband, the husband had an estate tail general and the wife an estate for life (Littleton's Tenures s 26), and where the limitation was to the husband and wife and to the heirs of the husband which he was to beget on the body of the wife, the husband had an estate in special tail and the wife an estate for life (Littleton's Tenures s 27). Furthermore a limitation to husband and wife and to the heirs of the body of the wife begotten by the husband gave the wife an estate in special tail and the husband an estate for life: Littleton's Tenures s 28; *Denn d Trickett v Gillot* supra; *Reps v Bonham* (1608) Yelv 131. See also *Gossage v Tayler* (1652) Sty 325; *Throgmorton d Robinson v Wharrey* (1770) 3 Wils 144. A limitation to A and his heirs on the body of Jane S begotten was an estate tail: *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 140b; fifth resolution. This had been questioned on the ground that the heirs might be collateral and begotten on the body of Jane S by another than A, but 'begotten' necessarily means begotten by A: Co Litt 26b.

13 *Mandeville's Case* (1328) Co Litt 26b; *Wright v Vernon* (1854) 2 Drew 439 (affd sub nom *Vernon v Wright* (1858) 7 HL Cas 35). Cf in the case of a limitation in fee simple *Moore v Simkin* (1885) 31 ChD 95.

14 Littleton's Tenures s 30. See also *Re Mountgarret, Mountgarret v Ingilby* [1919] 2 Ch 294.

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(ii) Disentail

A. DISENTAIL AT COMMON LAW

121. Disentail before 1834.

By the Statute of Westminster the Second[1] estates tail, so far as the legislature could effect its intention, were made inalienable. Under the provisions of that statute, whatever disposition was made by the donee the issue in tail could, on his death, defeat the disposition and recover the land. However, the tendency of the courts was to favour free alienation[2], and, in the course of the next two centuries, they overrode the declared intention of the legislature, and it was established that the tenant in tail by using the fictitious legal process known as a 'common recovery' could bar both the issue in tail and the remainders after the estate tail[3]. A second form of fictitious legal process, known as a 'fine', was by statute[4] made effective for the same purpose[5]. Fines and recoveries were abolished, as from 31 December 1833, with the exception of fines levied or recoveries suffered under proceedings pending at that date[6], and the present mode of barring entails is defined by statute[7].

1 Ie 13 Edw 1 (Statute of Westminster the Second) (1285) c 1: see PARA 117 ante.

2 As to the power of alienation see PARAS 8 ante, 231 post.

3 *Taltarum's Case* (1472) YB 12 Edw 4, fol 19, pl 25; Tudor LC Real Prop (3rd Edn) 695. See generally 2 Bl Com (14th Edn) 357 et seq; Digby's History of the Law of Real Property (5th Edn) 251 et seq; Challis's Law of Real Property (3rd Edn) 302 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 247.

4 Ie 4 Hen 7 c 24 (Fines) (1488) (repealed). The fine was older than the recovery, but its use for the purpose of barring an entail was expressly prohibited by 13 Edw 1 (Statute of Westminster the Second) (1285) c 1.

5 See generally 2 Bl Com (14th Edn) 348 et seq; Challis's Law of Real Property (3rd Edn) 302 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 248.

6 Fines and Recoveries Act 1833 ss 2, 3 (repealed as obsolete by the Law of Property (Amendment) Act 1924 s 10, Sch 10 (repealed)). The Fines and Recoveries Act 1833 remains in force in regard to dealings with entailed interests as equitable interests: see the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 4. See also the Law of Property Act 1925 s 130(1) (repealed); and PARA 119 note 3 ante.

7 As to the statutory powers see PARAS 122-123 post. As to entailed interests generally see PARA 117 et seq ante.

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B. STATUTORY POWER TO DISENTAIL

122. Effect of statutory disentail.

A complete disentailment is effected when land is set free from the claims both of the issue in tail and of interests subsequent to, or in defeasance of, the estate tail. This result follows when the tenant in tail effectually disposes of the equitable interest in the land in fee simple. A

partial disentailment takes place when the tenant in tail effectually disposes of an equitable interest in the land less than the fee simple, and then the claims of the issue in tail and of the remaindermen are overriden to the extent necessary to give effect to the disposition[1].

1 A conveyance by the tenant in tail of the legal estate in the land under the provisions of the Settled Land Act 1925 does not bar the interests of the issue in tail and the remaindermen; the grantee takes the land free from them, but they attach to the purchase money instead: see the Law of Property Act 1925 s 2(1)(i). In order to disentail since 1925, the tenant in tail must therefore make an assurance of the equitable interest in the land. In practice the grantees are usually the trustees of the settlement. See further PARA 126 post.

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123. Who can disentail.

Every actual tenant in tail[1], whether in possession, remainder, contingency[2] or otherwise, has now, by statute, full power to dispose of the land entailed for an estate in fee simple absolute, or for any less interest[3]; and consequently he may effect either a complete or a partial disentailment of the land, which term, for this purpose, includes hereditaments of any tenure, whether corporeal or incorporeal[4]. However, the power is not exercisable by a tenant in tail after possibility of issue extinct[5], or by the tenant in tail of certain land conferred for public services on the original grantees[6]. The full power of barring the entail may only be exercised by a tenant in tail of full age in possession. Until he attains the age of 18, he is subject in this respect to the ordinary disability of minority[7]; and, while his estate is future, his powers depend on the consent of the protector of the settlement[8]. Without this consent, he may only create a base fee[9].

As under the previous law, the right to bar the entailed interest is a necessary incident of the interest and may not be fettered by the settlor[10].

1 Ie the tenant of an estate in tail which has not been barred. Such tenant is deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right: Fines and Recoveries Act 1833 s 1. Formerly an estate might be turned to a right of entry, in which case the tenant was merely divested of possession and could regain the possession by re-entering or by a possessory action. This was the case where a tenant for life, prior to the estate tail, alienated in fee. However, an alienation by tenant in tail had a greater effect: it worked a discontinuance (see 1 Preston's Abstracts of Title 364), and deprived the issue in tail of his right of entry, leaving him with the right of property, which he could only assert in a proprietary action (Co Litt 327b; Co Litt 239a, Butler's note (1); *Goodright d Fowler v Forester* (1809) 1 Taunt 578 at 587 et seq, Ex Ch). This distinction was abolished by the Real Property Limitation Act 1833 (repealed), and a claimant to an estate, as long as he has a right of action, has also a right of entry: see LIMITATION PERIODS vol 68 (2008) PARA 1025 et seq. However, in the present connection 'divest' includes the case where the tenant in tail has ceased to have both possession and the right of possession, where, eg he has alienated the land without barring the issue, so as to pass a base fee, and where his property has been transferred to another person by operation of law. Thus the tenant in tail continues to be actual tenant in tail for the purpose of the statute (1) where he has been ousted by an adverse claimant; (2) where he has alienated in fee not under the statute; (3) where his estate has been transferred by operation of law, as, formerly, upon its transfer to an administrator on conviction for felony: *Re Gaskell and Walters' Contract* [1906] 2 Ch 1, CA. Note that no further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARA 119 ante.

2 See *Re St Albans' Will Trust* [1963] Ch 365, [1962] 2 All ER 402, where the presumptive successor to a dukedom was held entitled to a contingent interest in property and not a mere *spes successionis* (ie an expectation of succession, as distinct from a vested right). Cf *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51; *Re Midleton's Will Trusts, Whitehead v Earl Midleton* [1969] 1 Ch 600, [1967] 2 All ER 834. See also PARA 183 post. In *Re St Albans' Will Trust* supra at 372 and at 405, obiter, per Pennycuick J, the question whether a person entitled to a mere *spes successionis* can execute a disentailing assurance was left open.

3 See the Fines and Recoveries Act 1833 s 15 (amended by the Statute Law Revision (No 2) Act 1888). This applies also to a perpetual rentcharge granted to a trustee in trust for successive tenants in tail with ultimate remainder to the grantor: *Re Frank's Estate* [1915] 1 IR 387, Ir CA, distinguished in *Pinkerton v Pratt* [1915] 1 IR 406, where a disentailing deed was held to create only a base fee in the rentcharge. The statutory power to disentail is applied to money subject to be invested in the purchase of freehold land: see the Fines and Recoveries Act 1833 s 71 (as so amended; further amended by the Statute Law (Repeals) Act 1969). Where money in court is subject to be so invested, the disentailing deed does not convert the interest thereby dealt with into an interest in personalty, and s 71 (as so amended) merely directs that such money should be treated as personal estate only for the purpose of the form of a disentailing deed: *Re Dickson's Settled Estates* [1921] 2 Ch 108, CA. Under the Law of Property Act 1925 s 130(1) (repealed), the statutory power to disentail was made applicable to entailed interests in personalty. As to disposing of the entailed interests of mentally disordered persons see MENTAL HEALTH vol 30(2) (Reissue) PARA 701; and *Re EDS* [1914] 1 Ch 618, CA, which, however, turned on the Lunacy Act 1890 s 120 (repealed).

4 See the Fines and Recoveries Act 1833 s 1 (amended with savings so as to remove the words 'and any undivided share' by the Trusts of Land and Appointment of Trustees Act 1996 ss 25(2), (4), 27(2), Sch 4). Cf para 78 et seq ante. Since 1 January 1926, it has not been possible to have a legal estate in an undivided share in land: Law of Property Act 1925 s 1(6). Thereafter, but prior to 1 January 1997, an undivided share in land was able to take effect only behind a trust for sale: see the Settled Land Act 1925 s 36(4) (as originally enacted). Under the doctrine of conversion, it was therefore deemed to be an interest in the proceeds of sale of the land, not in the land itself: see further PARAS 50 note 6, 77 note 7 ante. An entailed interest existing before 1926 in an undivided share in land became a corresponding entailed interest in the net proceeds of sale attributable to that share: Law of Property (Entailed Interests) Act 1932 s 1 (enacted in order to overrule the decision in *Re Price* [1928] Ch 579 on this point), amending the Settled Land Act 1925 s 36(6) (now substituted with savings by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (4), Sch 3 para 2(11)(c)).

Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, all undivided shares in land must exist behind a trust of land and are deemed to be interests in the land itself, not in the proceeds of sale thereof: see ss 1, 3, 25(1), Sch 3 para 2(11)(b).

5 See the Fines and Recoveries Act 1833 s 18 (as amended); and PARA 132 post. Section 18 was prospectively repealed by mistake by the Law of Property (Amendment) Act 1924 s 10, Sch 10 (repealed), and was revived by the Expiring Laws Act 1925 s 1(2), Sch 1 Pt II (repealed). As to who may be a tenant in tail after possibility of issue extinct see PARA 148 post.

6 As to estates granted by the Crown or limited by private Act see PARA 133 post.

7 As to disentail by persons under a disability see PARA 127 post. As to barring the estate tail of a minor to raise money for maintenance see *Re Gower's Settlement* [1934] Ch 365.

8 As to the protector of the settlement see PARA 124 post.

9 As to base fees see PARA 134 et seq post.

10 *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 64, HL.

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124. Protector of the settlement.

Where a tenant in tail who proposes to bar the entail is not immediately entitled in possession, the exercise of his power to disentail is subject to the consent of the protector of the settlement. In settlements which came into operation before 1926, the settlor could appoint any number of persons not exceeding three to be special protectors of the settlement, and could nominate a person to appoint further special protectors in the place of any who might die or relinquish office[1]. Subject to any such appointment, and in all other cases, the protector is designated by statute[2]. He is the owner of the first sufficient estate, usually a life estate[3], prior to the estate tail, provided that it subsists under the same settlement as the estate tail[4]; but an estate arising by way of resulting trust[5] to the settlor is deemed for this purpose to be an estate arising under the same settlement[6].

The prior estate which constitutes the protector is the beneficial estate[7], and, if there is a person beneficially entitled under a prior estate, he is the protector, notwithstanding that there is a concurrent legal estate in a trustee[8]. Indeed, it seems that a trustee cannot in virtue of his trust estate be protector[9], and that, if there is no person who can appoint by virtue of his beneficial interest, there is no protector and the property can be disentailed without consent[10].

An heir, an executor or an administrator may not be protector in respect of any estate taken by him as such heir, executor or administrator[11]; and in such a case the office devolves upon the owner of any other prior estate who, if the estate of the person so excluded did not exist, would be protector[12].

Where the prior estate conferring the office of protector is vested in two or more persons, each of them in respect of the undivided share of which he could dispose is deemed the owner of a prior estate, and is exclusively the protector of the settlement to the extent of such undivided share[13]. Where the prior estate belongs to a married woman, then, in respect of disentailments made after 1882, she alone is the protector of the settlement[14].

If any person who would otherwise be protector of a settlement is incapable, by reason of mental disorder within the meaning of the Mental Health Act 1983[15], of managing and administering his property and affairs, the judge having jurisdiction under Part VII[16] of that Act is substituted as protector of the settlement[17]. If there is a prior estate under the settlement sufficient to qualify a protector, but in fact there is for the time being no protector, the High Court is substituted as protector[18]. Where the judge or the court is substituted as protector, he or it has power, on the application of the tenant in tail, to consent to a disposition by the tenant in tail, but it must be such as he or it approves[19]. If the judge or the court is protector jointly with any other person, the other person must consent in the statutory manner[20]. In giving consent, the court will consider what, with reference to the interests of the family, it would be proper for the tenant for life to do, and will endeavour to protect the objects of the settlement rather than give any benefit to one member of the family to the exclusion of the others[21].

The owner of the prior interest continues to be protector of the settlement notwithstanding that such interest has been charged or incumbered by him or the settlor or otherwise, or that the whole of the rents and profits are exhausted or required for payment of charges and incumbrances, and the office of protector remains vested in the original owner of the interest after he has ceased to be entitled to it, whether by absolute disposition, or by bankruptcy or insolvency, or by any other act or default[22].

1 See the Fines and Recoveries Act 1833 s 32 (repealed as respects settlements made or coming into operation after 1925 by the Law of Property Act 1925 s 207, Sch 7 (repealed)). Where one of several persons constituting the protector died, the survivors could act until the vacancy was supplied (*Bell v Holtby* (1873) LR 15 Eq 178) unless the settlor had clearly excluded the exercise of the powers of protector during a vacancy (*Cohen v Bayley-Worthington* [1908] AC 97, HL). Where all the persons constituting the protector died, the office devolved upon the statutory protector: *Clarke v Chamberlin* (1880) 16 ChD 176. However, the court did not favour the appointment of a special protector: *Bankes v Baroness le Despencer* (1843) 11 Sim 508 at 527.

2 See the Fines and Recoveries Act 1833 ss 22-31 (as amended). Of these ss 29-31 related to dispositions before 1834 and are repealed as obsolete: Law of Property (Amendment) Act 1924 s 10, Sch 10 (repealed). The Fines and Recoveries Act 1833 s 24 is also repealed; and ss 22, 23, 25-28 are amended by the Statute Law Revision (No 2) Act 1888.

3 Fines and Recoveries Act 1833 s 22 (as amended: see note 2 supra). The estates specified as sufficient to confer the office of protector are 'any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years)': s 22 (as so amended). An estate for years determinable on a life or lives was mentioned with reference to a form of settlement which was practically obsolete before 1926. The first limitation was frequently to A for 99 years if he should so long live, followed by a remainder to his first and other sons in tail. A had thus no estate of freehold, and his concurrence in a recovery was not necessary. This form of limitation was used in order to keep the land in settlement as long as possible: see *Bell v Holtby* (1873) LR 15 Eq 178 at 189. However, in effect, A had an estate for life, and the Fines and Recoveries Act 1833 expressly made his assent to disentailing necessary. An actual life estate was greater than an estate for years determinable on life; consequently, this was within s 22 (as so amended) and so a fortiori was a prior estate tail:

Re Blewitt (1855) 6 De GM & G 187. Thus, where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder: *Re Blewitt* supra; Carson's Real Property Statutes (3rd Edn) 322.

4 The owner of an estate arising under a different settlement is not protector (*Berrington v Scott* (1875) 32 LT 125; *Re Hughes* [1906] 2 Ch 642), but an estate confirmed or restored by a settlement is deemed to subsist thereunder (see the Fines and Recoveries Act 1833 s 25), although a lessee under a lease at a rent created or confirmed by a settlement cannot in that respect be protector (see s 26) (both as amended: see note 2 supra).

5 Formerly also an estate arising by way of resulting use.

6 See the Fines and Recoveries Act 1833 s 22 (as amended: see note 2 supra). As to when a resulting trust arises see PARA 181 post and eg *Lynch v Clarkin* [1900] 1 IR 178, Ir CA. An estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, is also deemed to be an estate under the same settlement: see the Fines and Recoveries Act 1833 s 22 (as so amended). A dowress, whose interest must have arisen in respect of a death before 1926, cannot be protector: see s 27 (as so amended; also amended by the Administration of Estates Act 1925 s 56, Sch 2).

7 *Re Dudson's Contract* (1878) 8 ChD 628 at 632-634, CA; *Re Ainslie (No 2), Ainslie v Ainslie* (1884) 54 LJ Ch 8; *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46; *Re Darnley's Will Trusts, Darnley v Bligh* [1970] 1 All ER 319, [1970] 1 WLR 405.

8 See Sugden's Real Property Statutes (2nd Edn) 216. Where the prior estate and also the estate tail are equitable, the equitable tenant for life would before 1834 have been the person to make the tenant to the praecipe in the equitable recovery. Thus he was the protector under the Fines and Recoveries Act 1833 (*Re Dudson's Contract* (1878) 8 ChD 628 at 634, CA), and this is the position since 1925. The tenant for life has the legal estate, but he is protector by virtue of his equitable life estate.

9 A 'bare trustee' cannot, in respect of any estate taken by him as such bare trustee, be protector: see the Fines and Recoveries Act 1833 s 27 (as amended: see notes 2, 6 supra; also amended by the Statute Law (Repeals) Act 1969). For the meaning of 'bare trustee' see TRUSTS vol 48 (2007 Reissue) PARA 755. It may mean a trustee without any beneficial interest (*Morgan v Swansea Urban Sanitary Authority* (1878) 9 ChD 582), or a trustee who has no active duties to perform (*Re Cunningham and Frayling* [1891] 2 Ch 567; *Re Howgate and Osborn's Contract* [1902] 1 Ch 451). In relation to the Fines and Recoveries Act 1833 it has been held to mean a trustee without any beneficial interest: *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46. In a settlement created before the passing of the Fines and Recoveries Act 1833 (ie 28 August 1833), or perhaps before 31 December 1833 (see the discrepancy in dates in ss 27, 31, as originally enacted, and Sugden's Real Property Statutes (2nd Edn) 219), a bare trustee could be protector, since, in virtue of his legal estate, he would have been the person to make a tenant to the praecipe (see *Smith d Dormer v Packhurst* (1742) 3 Atk 135, HL), and this position was maintained for such settlements by the Fines and Recoveries Act 1833 s 31 (repealed). However, a bare trustee could insist on retaining the legal estate only so long as the purposes of the trust existed: *Buttanshaw v Martin* (1859) John 89.

The possibility of a trustee being protector is, perhaps, not definitely excluded. It appears to have been admitted by Cotton LJ in *Re Dudson's Contract* (1878) 8 ChD 628 at 633, CA, but in *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46 at 57, Peterson J observed that this was not necessary for deciding *Re Dudson's Contract* supra. See also *Re Darnely's Will Trusts, Darnley v Bligh* [1970] 1 All ER 319, [1970] 1 WLR 405.

10 *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46. However, in that case, the existence of the Fines and Recoveries Act 1833 s 33 (as amended) (see the text and notes 15-18 infra), appears to have been overlooked: see *Re Darnley's Will Trusts, Darnley v Bligh* [1970] 1 All ER 319 at 322, [1970] 1 WLR 405 at 410, obiter per Pennycuick J, who would have held that the court was the protector by virtue of the Fines and Recoveries Act 1833 s 33 (as amended) but felt obliged to follow *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* supra.

11 See the Fines and Recoveries Act 1833 s 27 (as amended: see notes 2, 6, 9 supra). See also Challis's Law of Real Property (3rd Edn) 317. Thus an heir who took in consequence of the failure of a trust for accumulation under the Accumulations Act 1800 (now replaced by the Law of Property Act 1925 s 164; and the Perpetuities and Accumulations Act 1964 s 13) could not be protector, notwithstanding that he took by way of resulting use. Cf the Fines and Recoveries Act 1833 s 22 (as amended: see note 2 supra); *Re Hughes* [1906] 2 Ch 642. There can now only be an heir where the ancestor died before 1926 (see the Administration of Estates Act 1925 s 45), or in certain cases of succession to a person of unsound mind (see s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), (4), Sch 8 Pt I and by virtue of the Mental Health Act 1983 s 148, Sch 5 para 29)). See further EXECUTORS AND ADMINISTRATORS.

12 See the Fines and Recoveries Act 1833 s 28 (as amended: see note 2 supra), which applies also where a dowress, or a bare trustee is excluded by s 27 (as amended: see notes 2, 6, 9 supra).

13 See ibid s 23 (as amended: see note 2 supra). An undivided share can now only take effect behind a trust of land: Settled Land Act 1925 s 36(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(11)(b)). Where the tenant for life of an undivided share is also tenant in tail in remainder of a like share, he is protector in respect of the particular undivided share of which he is tenant in tail, and not of a corresponding aliquot share of the land: *Tufnell v Borrell* (1875) LR 20 Eq 194. Cf *Oakley v Smith* (1759) Amb 368 (sub nom *Oakeley v Smith* (1759) 1 Eden 261); *Church v Edwards* (1787) 2 Bro CC 180; 3 Preston on Conveyancing 90.

14 Married Women's Property Act 1907 s 3 (amended by the Law Reform (Married Women and Tortfeasors) Act 1935 s 5(2), Sch 2). As to disentailments before 1883, she and her husband together constituted the protector and were deemed one owner: Fines and Recoveries Act 1833 s 24 (repealed). See also *Keer v Brown* (1859) John 138.

15 For the meaning of 'mental disorder' see MENTAL HEALTH vol 30(2) (Reissue) PARA 402.

16 Ie the Mental Health Act 1983 Pt VII (ss 93-113) (as amended): see MENTAL HEALTH vol 30(2) (Reissue) PARA 674 et seq.

17 See the Fines and Recoveries Act 1833 s 33 (amended by the Statute Law Revision (No 2) Act 1888; the Mental Health Act 1959 s 149(1), Sch 7; the Criminal Law Act 1967 s 10, Sch 3 Pt I; the Mental Health Act 1983 s 148, Sch 4 para 1). As to the judge having jurisdiction under Pt VII (as amended) see MENTAL HEALTH vol 30(2) (Reissue) PARA 675.

18 See the Fines and Recoveries Act 1833 s 33 (as amended: see note 17 supra). Where the prior estate is vested in trustees and the beneficiaries do not qualify as protector, it seems that s 33 (as so amended) does not apply and consequently that there is no protector.

19 See ibid s 48 (amended by the Statute Law Revision (No 2) Act 1888; and the Mental Health Act 1983 s 148, Sch 4 para 1).

20 See the Fines and Recoveries Act 1833 s 48 (as amended: see note 19 supra). As to the mode of consent see PARA 128 post. In the case of the judge or the court, no further evidence of consent than the order is requisite: s 49 (as so amended).

21 *Re Newmam* (1837) 2 My & Cr 112; *Re Graydon* (1850) 1 Mac & G 655; *Re Tharp* (1876) 3 ChD 59. In these cases consent was refused on the principle stated in the text, but it has been given where the object was to advance the son of a mentally disordered person (*Grant v Yea* (1834) 3 My & K 245), or to enable the tenant in tail to disentail for the purpose of securing repayment to the estate of the mentally disordered tenant for life of an allowance out of surplus income, but only so far as to let in the charge (*Re Sparrow* (1882) 20 ChD 320, CA; *Re Beridge* (1884) 50 LT 653), and generally where the arrangement is one which might have been reasonably made by the mentally disordered person (*Re Blewitt* (1855) 6 De GM & G 187 at 198). See further MENTAL HEALTH vol 30(2) (Reissue) PARA 685.

22 See the Fines and Recoveries Act 1833 s 22 (as amended: see note 2 supra). See also s 27 (as amended: see notes 2, 6, 9 supra), where an assign is excluded from the office of protector.

UPDATE

124 Protector of the settlement

NOTES 17-20--1833 Act ss 33, 48, 49 further amended and 1983 Act Sch 4 para 1 repealed: Mental Capacity Act 2005 Sch 6 para 1, Sch 7.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/B. STATUTORY POWER TO DISENTAIL/125. Mode of disentailment before 1926.

125. Mode of disentailment before 1926.

A disposition of lands[1] under the Fines and Recoveries Act 1833 could only be effected by deed, but subject to this it could be effected by any assurance which would be appropriate for making

the disposition if the tenant in tail had had an estate at law in fee simple absolute[2]. A mere declaration by deed, and a fortiori a disposition by a tenant in tail resting only in contract, whether express or implied or otherwise, and whether supported by valuable consideration or not, was of no force at law or in equity under the statute, notwithstanding that it was made or evidenced by deed[3].

The disentailing deed was required to be enrolled[4] within six months after execution, otherwise it had no operation under the Fines and Recoveries Act 1833[5]. The enrolment, even if it took place after the death of the tenant in tail who executed the deed[6], related back to the date of execution of the deed[7] and was effectual, save as against a subsequent purchaser for valuable consideration whose deed was enrolled first[8]. The requirement of enrolment has been abolished as regards disentailing assurances after 1925, and the assurance is as effectual for all purposes without enrolment as if it had been duly enrolled within the prescribed time[9].

1 As to the meaning of 'lands' see the Fines and Recoveries Act 1833 s 1 (the word 'lands' extends to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure); and see PARA 123 ante; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 761.

2 See ibid s 40 (ss 40, 47 amended by the Statute Law Revision (No 2) Act 1888; the Fines and Recoveries Act 1833 s 40 further amended by the Statute Law (Repeals) Act 1969). No particular form of disentailing deed was necessary. It was sufficient that the deed would, if the grantor had been seised in fee simple, have passed that estate: *Nelson v Agnew* (1871) 6 IR Eq 232. Thus a declaration of trust was not sufficient: *Green v Paterson* (1886) 32 ChD 95 at 108, CA; *Carter v Carter* [1896] 1 Ch 62 at 67, 69. If, before the repeal of the Statute of Uses (1535) (see PARA 20 ante), the deed conveyed 'unto and to the use of' a trustee, it operated as a grant at common law, and the trustee should execute it, otherwise it might be avoided by his disclaimer (see DEEDS AND OTHER INSTRUMENTS; *Peacock v Eastland* (1870) LR 10 Eq 17; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523 at 540, CA); although in such a case the legal estate might revest in the tenant in tail as an estate in fee simple (see *Mallott v Wilson* [1903] 2 Ch 494). Where the deed operated under the Statute of Uses (1535) (repealed) it was not necessary that the grantee to uses should execute it: *Nelson v Agnew* supra. Since the repeal of that statute the words 'and to the use of' are inappropriate and are omitted, but this does not alter the effect of the conveyance, and it should be executed by the trustee: see DEEDS AND OTHER INSTRUMENTS.

3 See the Fines and Recoveries Act 1833 ss 40, 47 (as amended: see note 2 supra). Similarly, before 1834 the issue in tail was not bound to complete a contract made by his ancestor to bar the entail, since his claim was paramount in the form of a gift (*A-G v Day* (1749) 1 Ves Sen 218 at 224; *Hinton v Hinton* (1755) 2 Ves Sen 631 at 634; *Frank v Mainwaring* (1839) 2 Beav 115 at 126), notwithstanding that the ancestor had received the purchase money and a decree had been made against him (*Weale v Lower* (1672) Poll 54, and apparently referred to in *Powell v Powell* (1708) Prec Ch 278; *A-G v Day* supra). An order for specific performance may still be made against the tenant in tail (*Bankes v Small* (1887) 36 ChD 716, CA), and he may be required to execute a disentailing deed, provided that this was really contemplated by the contract (*Davis v Tollemache* (1856) 2 Jur NS 1181; see also *Pryce v Bury* (1853) 2 Drew 11; on appeal (1854) LR 16 Eq 153n).

4 The deed was enrolled in the Enrolment Department of the Central Office, Royal Courts of Justice, Strand, London, the original being left there for a copy to be enrolled. After enrolment, a certificate of the fact of enrolment was indorsed on the deed, which was returned to the party leaving it.

5 See the Fines and Recoveries Act 1833 s 41 (repealed).

6 *Re Pier's Estate, ex p Browne* (1863) 14 I Ch R 452; *Whitmore-Searle v Whitmore-Searle* [1907] 2 Ch 332.

7 Fines and Recoveries Act 1833 s 74 (repealed); *Cattell v Corrall* (1840) 4 Y & C Ex 228 at 236.

8 Fines and Recoveries Act 1833 s 74 (repealed), which, however, did not apply to deeds executed by successive tenants in tail: *Re Pier's Estate, ex p Browne* (1863) 14 I Ch R 452.

9 Law of Property Act 1925 s 133 (repealed). The Fines and Recoveries Act 1833 ss 41, 46, s 58 (in part), s 59, s 71 (in part), ss 73, 74 (relating to enrolment) have been repealed by the Law of Property (Amendment) Act 1924 s 10, Sch 10. The Fines and Recoveries Act 1833 ss 58, 71 have been in part further repealed by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt III.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/B. STATUTORY POWER TO DISENTAIL/126. Mode of disentailment after 1925.

126. Mode of disentailment after 1925.

The mode of disentailment remains in most respects the same as it was before 1926, but the property legislation of 1925 effected two major changes. First, a tenant in tail of full age may now dispose by will of all property of which he is tenant in tail in possession at his death, so as to confer an absolute interest on the devisee[1]. Secondly, since entailed interests can now only take effect in equity, the disentailing deed must now take the form of an assurance of the whole equitable interest, and the legal estate is not affected by it[2]. If the legal estate has been vested in the tenant in tail by a vesting instrument under the Settled Land Act 1925 it may only be dealt with in accordance with the provisions of that Act[3].

There is no longer a requirement that the disentailing deed be enrolled[4].

1 As to the power of disposition by will see PARA 141 post.

2 See PARA 122 note 1 ante.

3 See the Settled Land Act 1925 s 18 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 712. If the legal estate is vested in the tenant in tail but no vesting instrument has been executed, the tenant in tail may bar his equitable entail and thereafter make a valid disposition of the land as absolute legal owner in fee simple without first obtaining a vesting deed: *Re Alefounder's Will Trusts, Adnams v Alefounder* [1927] 1 Ch 360. See further SETTLEMENTS.

4 See PARA 125 text and note 9 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/B. STATUTORY POWER TO DISENTAIL/127. Disentail by persons under disability.

127. Disentail by persons under disability.

A married woman is under no disability as to disentailment[1].

Where a minor is tenant in tail in possession, and a disentailing deed requires to be executed in order to carry out a court order, he is declared a trustee within the meaning of the Trustee Act 1925[2], and a person is appointed to convey on his behalf[3]; but this is only when, for some special reason, it is necessary to bind the minor's estate, and the court has jurisdiction to do so[4]. Ordinarily, under a strict settlement, no irrevocable disentail can be effected until the first tenant in tail has attained the age of 18[5]; but a disentailing assurance executed by a minor is valid until it is revoked[6].

The receiver of a person who is incapable by reason of mental disorder of managing and administering his property and affairs may be authorised[7] to bar the entail of land of which that person is tenant in tail[8].

An alien may bar an entail[9], but a bankrupt's estate can be barred only by his trustee[10].

1 Formerly where a married woman was tenant in tail and she had not the powers of a feme sole under the Married Women's Property Act 1882 (ie where she was married before 1 January 1883, and her title to the property accrued before that date: see ss 1(1), 2, 5 (repealed with a saving where coverture began before 1 January 1883 in respect of property the title to which accrued before that date: see the Law Reform (Married

Women and Tortfeasors) Act 1935 ss 4(1)(a), 5(2), Sch 2)) her husband had to concur, unless his concurrence was specially dispensed with by the court (see the Fines and Recoveries Act 1833 s 91, and the Law of Property Act 1925 s 167(3) (both repealed)), and the deed had to be acknowledged by her (see the Fines and Recoveries Act 1833 s 40 (as originally enacted), which applied notwithstanding that the property was settled on the married woman for her separate use: *Cooper v Macdonald* (1877) 7 ChD 288 at 295, CA. The Fines and Recoveries Act 1833 s 40 was amended as regards married women by the Statute Law (Repeals) Act 1969 Schedule Pt III). Where she had such powers in respect of the estate tail this was not necessary: *Re Drummond and Davies' Contract* [1891] 1 Ch 524. Acknowledgments by married women were abolished by the Law of Property Act 1925 (see s 167(1), and as to dispensing with the husband's concurrence see s 167(3) (both repealed)); and by the Law Reform (Married Women and Tortfeasors) Act 1935 a married woman is capable of disposing of any property in all respects as a feme sole (see s 1 (amended by the Law Reform (Husband and Wife) Act 1962 s 3(2), Schedule)).

2 See the Trustee Act 1925 ss 48-50; and see generally TRUSTS vol 48 (2007 Reissue) PARA 877 et seq. For the meaning of 'trustee' see s 68(17).

3 *Re Montagu, Faber v Montagu* [1896] 1 Ch 549. See also *Radcliffe v Eccles* (1836) 1 Keen 130; *Powell v Matthews* (1855) 1 Jur NS 973. However, if the order is made without jurisdiction, the land remains subject to the limitations of the settlement: *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620.

4 There is jurisdiction to order the disentailment of a minor's estate tail in order to raise money for his maintenance, education or benefit: see the Trustee Act 1925 s 53; *Re Gower's Settlement* [1934] Ch 365; *Re Meux, Gilmour v Gilmour* [1958] Ch 154, [1957] 2 All ER 630.

5 As to the disability of minority see PARA 123 ante.

6 As to minors and alienation generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 46.

7 Ie may be authorised by the judge, as to whom see MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

8 See the Mental Health Act 1983 s 96(1)(k); and MENTAL HEALTH vol 30(2) (Reissue) PARA 701.

9 *Anon* (1588) 4 Leon 84; 1 Jarman on Wills (8th Edn) 110. See further BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

10 As to the trustee's powers over entailed property see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 461.

128. Consent of protector.

If, when a tenant in tail who is not entitled to the remainder or reversion in fee immediately expectant on the estate tail is desirous of disentailing the land, there is a protector of the settlement, the protector's consent is necessary to make the deed effectual to bar the remainders or reversion after the estate tail, but it is not necessary in order to bar the issue in tail or other persons claiming by force of the estate tail[1]. However, if the tenant in tail is himself entitled to the remainder or reversion in fee immediately following the estate tail, this is included in the disposition so far as is necessary to give effect to it without any consent of the protector[2].

No control or fetter can be imposed on the protector of a settlement in regard to giving his consent, and any agreement by him to withhold his consent is void; he is not a trustee in respect of his power of consent, and in giving or withholding it he is subject to no control of a court of equity[3]. No transaction between him and the tenant in tail can be impeached on the ground that it is a fraud on the power of consent[4].

The protector's consent must be given by the disentailing deed or by a separate deed executed either on or before the date of the making of the disentailing deed[5]. In the latter case, the

separate deed is treated as an absolute and unqualified consent, unless in such deed of consent the protector refers to the particular disentailing deed and confines his consent to that[6]. A consent once given is irrevocable[7].

1 See the Fines and Recoveries Act 1833 s 34 (ss 34-37, 42-45 amended by the Statute Law Revision (No 2) Act 1888). The effect is to make the tenant for life merely a consenting party, and not, as he formerly was, a conveying party. The consent of the tenant for life to the disentailment does not necessarily prevent his assenting to a subsequent exercise of powers under the settlement, such as a power of sale and exchange, which raise trusts paramount to the estate tail: *Hill v Pritchard* (1854) Kay 394. As to the protector of the settlement see PARA 124 ante.

2 See the Fines and Recoveries Act 1833 s 34 (as amended: see note 1 supra).

3 See ibid s 36 (as amended: see note 1 supra). The motive which animates the protector is immaterial: *Bankes v Baroness Le Despencer* (1843) 11 Sim 508 at 527.

4 See the Fines and Recoveries Act 1833 s 37 (as amended: see note 1 supra). This reproduces the former law: see *Davis v Uphill* (1818) 1 Swan 129; *Tweddell v Tweddell* (1822) Turn & R 1. As to frauds on powers see POWERS.

5 See the Fines and Recoveries Act 1833 s 42 (as amended: see note 1 supra). If the consent was given by a distinct deed, that deed had formerly to be enrolled: s 46 (repealed). The execution by the protector of the disentailing deed may be subsequent to the death of the tenant in tail who has executed it: *Whitmore-Searle v Whitmore-Searle* [1907] 2 Ch 332; and see also *Re Courage Group's Pension Schemes, Ryan v Imperial Brewing and Leisure Ltd* [1987] 1 All ER 528 at 537, [1987] 1 WLR 495 at 505 per Millett J. A married woman who was protector, either alone or jointly with her husband, might consent in the same manner as a feme sole: see the Fines and Recoveries Act 1833 s 45 (as amended: see note 1 supra).

6 See ibid s 43 (as amended: see note 1 supra).

7 See ibid s 44 (as amended: see note 1 supra).

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129. Defective disentail not made good in equity.

No defects in the execution of the power of disposition given to tenants in tail, or of the power of consent given to protectors, can be made good in equity; nor in any circumstances can the want of execution of such powers of disposition and consent be supplied[1]. Consequently, attempted dispositions by a tenant in tail which fail to bar the entailed interest under the Fines and Recoveries Act 1833 through some defect cannot be validated upon the principles applicable to defective execution of powers; and contracts to execute disentailing assurances cannot be treated in equity as being equivalent to actual disentailing deeds as against the issue in tail and remaindermen[2]. However, the court is not precluded from enforcing, as against the tenant in tail, a contract entered into by him which requires the entailed interest to be barred[3]; and the statutory prohibition of equitable interference does not extend to rectification, so that a disentailing deed may be rectified on the ground of mistake[4].

1 See the Fines and Recoveries Act 1833 s 47 (amended by the Statute Law Revision (No 2) Act 1888). When the estates were legal, the disentailment was not effectual unless it was good at law; and when the estates were equitable, all the steps must have been taken which would have been necessary if the estates had been legal: see the Fines and Recoveries Act 1833 s 47 (as so amended). Now, however, the estate tail can only be equitable: see PARA 46 ante.

2 *Bankes v Small* (1887) 36 ChD 716 at 723, CA; *Mills v Fox* (1887) 37 ChD 153 at 166. As to equity aiding the execution of powers see POWERS.

3 *Bankes v Small* (1887) 36 ChD 716.

4 *Hall-Dare v Hall-Dare* (1885) 31 ChD 251, CA; *Meeking v Meeking* [1917] 1 Ch 77; and see MISTAKE vol 77 (2010) PARA 57 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/C. EFFECT OF DISENTAIL/130. Effect of a complete disentail.

C. EFFECT OF DISENTAIL

130. Effect of a complete disentail.

When an estate tail has been duly disposed of under the Fines and Recoveries Act 1833 for an estate in fee simple, the effect is to defeat entirely the claims both of the issue in tail and of all persons, including the Crown[1], whose interests are to take effect after the determination or in defeasance of the estate tail, although the rights of persons in respect of interests prior to the estate tail are not affected[2]. A shifting clause which, in a certain event, substitutes C for B as tenant in tail in remainder expectant on the death of A, the tenant for life, takes effect in defeasance of, and not in priority to, B's estate; consequently it is liable to be barred by a disentailing deed executed by B with A's consent[3]. However, the disposition does not operate to destroy the interest of the tenant in tail; his interest continues, although by virtue of his statutory power he is enabled to make it perpetual[4].

The effect of the disentail is commensurate with the estate out of which the entailed interest and the remainders were originally derived, and, if this was a determinable fee, the interest arising under the disentail cannot last longer than that fee[5].

1 Where the reversion was in the Crown, a recovery was a bar to the issue in tail, but apparently not to the Crown (*Anon* (1537) 1 Dyer 32a), although this was not clearly settled (Com Dig, Estates (B 31)). See also *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940 at 974, and the authorities cited in argument at 963, 969. The Fines and Recoveries Act 1833 s 15 (as amended) expressly bars the Crown.

2 Ibid s 15 (amended by the Statute Law Revision (No 2) Act 1888). See also *Re Skerrett* (1842) 2 Dr & War 585.

3 See *Milbank v Vane* [1893] 3 Ch 79, CA; *Vandeleur v Sloane* [1919] 1 IR 116, Ir CA. As to a recovery under the old law see *Doe d Lumley v Earl of Scarborough* (1835) 3 Ad & El 2; revsd sub nom *Earl of Scarborough v Doe d Savile* (1836) 3 Ad & El 897, Ex Ch. Generally, substituted estates tail will be barred by the disentailing deed if they take effect either after the determination or in defeasance of the original estate tail: *Lady Cardigan v Curzon Howe* [1901] 2 Ch 479 at 486. However, where a tenant for life joined with the tenant in tail in remainder to bar the entail, and the estate was resettled so as to restore the old life interest, the powers annexed to it took effect in priority to the estate tail and accordingly continued to be exercisable: *Roper v Hallifax* (1817) 8 Taunt 845; Sugden on Powers (8th Edn) 71, 73; *Hill v Pritchard* (1854) Kay 394; *Re Wright's Trustees and Marshall* (1884) 28 ChD 93. A power of appointment which is intended to be precedent to the estate tail (eg a power to A to appoint, and in default of, or until appointment, to B in tail) is apparently not affected by a disentail by B: Sugden's Real Property Statutes (2nd Edn) 194. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made thereafter: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

4 *Lord Lilford v A-G* (1867) LR 2 HL 63 at 70; *Duke of Northumberland v A-G* [1905] AC 406 at 410, HL; *De Trafford v A-G* [1935] AC 280, HL.

5 In this respect the disentailing deed has the same effect as a recovery under the former law: see Challis's Law of Real Property (3rd Edn) 316. As to determinable fees see PARA 114 et seq ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/C. EFFECT OF DISENTAIL/131. Effect of a partial disentail and a disentail for a limited purpose.

131. Effect of a partial disentail and a disentail for a limited purpose.

Formerly where a tenant in tail made a disposition under the Fines and Recoveries Act 1833 for an estate less than a fee simple absolute or for a limited purpose, its effect in barring the issue in tail and remaindermen depended on the nature of the estate created in favour of a grantee[1]. If an estate was created, greater than an estate pur autre vie or for years, the disposition operated, to the extent of that estate, as an absolute bar at law and in equity both to the issue in tail and the remaindermen; and this could not be prevented by any contrary intention, whether expressed or implied, in the disposition[2]. Consequently a mortgage in fee simple made by a disposition under the statute operated as a complete disentailing deed, the reservation of the equity of redemption to the tenant in tail giving him an estate free from the claims of the issue in tail and the remaindermen; and, if it was intended to preserve these claims, this could not be done by declaration to that effect, but the equity of redemption had to be limited so as to recreate them out of the enlarged estate of the tenant in tail[3]. However, if the disentail was for a limited purpose and the estate created was only an estate pur autre vie or for years absolute or determinable, then the disposition was in equity a bar only so far as might be necessary to give full effect to the limited purpose; and this was so notwithstanding any intention to the contrary, expressed or implied, in the deed of disposition[4]. Since entailed interests can take effect only in equity[5], the question of the disentailing effect of a mortgage is now unlikely to arise, but a lease by deed by a tenant in tail which is not within his powers as a tenant for life under the Settled Land Act 1925[6] will take effect in equity as a partial disentail[7].

1 See the Fines and Recoveries Act 1833 s 21 (amended by the Statute Law Revision (No 2) Act 1888).

2 See the Fines and Recoveries Act 1833 s 21 (as amended: see note 1 supra). According to the equitable rule, a mortgage by a donee of a power, or by a husband and wife of the wife's non-separate estate, did not disturb the beneficial title further than was necessary to give effect to the object of the disposition: *Jackson v Innes* (1819) 1 Bli 104, HL; *Plomley v Felton* (1888) 14 App Cas 61, PC. However, neither at law nor in equity was the effect of a fine or recovery by a tenant in tail as a bar measured by the declared purpose of the assurance: Hayes's Introduction to Conveyancing (5th Edn) 183-184. The Fines and Recoveries Act 1833 excluded the equitable rule (see Sugden's Real Property Statutes (2nd Edn) 199-200; *Plomley v Felton* (1888) 14 App Cas 61, PC), and made the estate the measure of the bar.

3 Hayes's Introduction to Conveyancing (5th Edn) 184.

4 See the Fines and Recoveries Act 1833 s 21 (as amended: see note 1 supra). Therefore, where the conveyance was to A for the life of B, or for 99 years if B shall so long live, or for 1,000 years, and the object was to effect a limited purpose such as a mortgage, the bar operated only to the extent of satisfying that purpose, and the resulting beneficial interest was subject to the entail: Hayes's Introduction to Conveyancing (5th Edn) 184-185. See further MORTGAGE vol 77 (2010) PARA 171.

5 As to equitable interests see PARA 46 ante.

6 See the Settled Land Act 1925 ss 41-48; and SETTLEMENTS vol 42 (Reissue) PARA 837 et seq.

7 As to such partial disentail see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 30.

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D. ESTATES TAIL WHICH CANNOT BE BARRED

132. Tenant in tail after possibility of issue extinct.

A tenant in tail after possibility of issue extinct[1] cannot exercise the statutory power of disposition[2]. He has ceased to have an estate of inheritance, and is for purposes of alienation in the position of tenant for life[3]. Consequently, he cannot bar the remaindermen.

1 As to a tenant in tail after possibility of issue extinct see PARA 148 post.

2 See the Fines and Recoveries Act 1833 s 18 (amended by the Statute Law Revision (No 2) Act 1888). As to the continuance of this provision see PARA 123 note 5 ante.

3 Co Litt 28a; *Bowles's Case* (1615) 11 Co Rep 79b at 80b; and see PARA 148 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/D. ESTATES TAIL WHICH CANNOT BE BARRED/133. Estates granted by the Crown or limited by private Act.

133. Estates granted by the Crown or limited by private Act.

An estate tail which has been granted by the Crown in consideration of money or services, the reversion remaining in the Crown, cannot be barred[1]. In certain cases where estates have been granted for eminent services, or where family arrangements are confirmed by Parliament, holders of the estates who are tenants in tail are forbidden by statute to bar the entail[2]. In such cases the statutory power[3] of disposition is excluded.

1 See the Feigned Recoveries Act 1542 s 1. The Act was repealed as obsolete by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt III, but the repeal of the Feigned Recoveries Act 1542 s 1 does not make barrable any entail existing on 1 January 1970 which was unbarrable by reason of s 1: Statute Law (Repeals) Act 1969 s 4(4).

2 See eg (1) as to the Marlborough estates *Davis v Duke of Marlborough* (1818) 1 Swan 74; *Osborn v Duke of Marlborough* (1866) 14 WR 886; *Re Duke of Marlborough's Blenheim Estates and Settled Land Acts* (1892) 8 TLR 582; *Hambro v Duke of Marlborough* [1994] Ch 158, [1994] 3 All ER 332; (2) as to the Bolton estates *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA; *Re Bolton Estates Act 1863* [1904] 2 Ch 289; (3) as to the Abergavenny estates (now freed from the restraint on alienation by the Marquess of Abergavenny's Estates Act 1946 s 3) *Earl of Abergavenny v Brace* (1872) LR 7 Exch 145; (4) as to the Wellington annuity and estates 54 Geo 3 c 161 (1813-14) s 28; the Wellington Museum Act 1947; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARAS 854-856; (5) as to the Nelson annuities and estates 46 Geo 3 c 146 (1806) (the annuities were terminated by the Trafalgar Estates Act 1947 s 1). The Pendrell annuities were granted by Charles II for unbarrable estates tail; as to the subsequent history of the annuities see *Re Grant of King Charles II, Giffard v Penderel-Brodhurst* (1936) 80 Sol Jo 92. Where purchased land is required to be brought within the restriction on alienation, the purchase must be in good faith: *Howard v Earl of Shrewsbury* (1867) 2 Ch App 760.

3 Ie under the Fines and Recoveries Act 1833: see PARAS 122-124 ante. To exclude the statutory power of disposition the restraint imposed by the private Act must be clear. A restraint will not be implied because the object of the Act appears to forbid a power of alienation: *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940 at 981. A tenant in tail who cannot bar the entail may exercise the statutory powers of a tenant for life (see SETTLEMENTS), save where the land was purchased with money provided by Parliament in consideration of public services: Settled Land Act 1925 s 20(1)(i), (iii); *Hambro v Duke of Marlborough* [1994] Ch 158, [1994] 3 All ER 332. In the case of the exception (as to which see *Re Duke of Marlbourgh's Blenheim Estates and Settled Land Acts* (1892) 8 TLR 582), any person of full age on whom the powers of the tenant for life are by the settlement expressed to be conferred, and in any other case the trustees of the settlement, have the statutory powers of the tenant for life: Settled Land Act 1925 s 23; *Hambro v Duke of Marlborough* supra. The restriction on the rights of the tenant for life of the Nelson estates (as to which see note 2 supra) to exercise the statutory powers was removed by the Trafalgar Estates Act 1947 s 2.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/134. Nature of estate.

E. BASE FEES

134. Nature of estate.

A base fee is a fee which is limited in duration and admits of an absolute fee existing by way of remainder upon it; but during its continuance it was until 1926 descendible, like an absolute fee, to the heirs general[1], and now devolves on the personal representatives of the deceased owner[2]. It cannot be created by limitation[3], but arises from a disposition by a tenant in tail, which, although purporting to create an absolute fee, is ineffectual to bar either the remainders only, or both the issue in tail and the remainders[4].

1 See *Walsingham's Case* (1579) 2 Plowd 547, Ex Ch; *Seymor's Case* (1612) 10 Co Rep 95b at 97b, 98a; Co Litt 18a. 'A base fee is where A has a good and absolute estate of fee simple in land, and B has another estate of fee in the same land, which shall descend from heir to heir, but which is base in respect of the fee of A, as being younger than the fee of A and not of absolute perpetuity as the fee of A is': *Walsingham's Case* supra at 557. See also Challis's Law of Real Property (3rd Edn) 325.

2 Administration of Estates Act 1925 s 1(1).

3 However, trusts closely corresponding to those as a base fee can be so created: see *Re Shelton's Settled Estates, Shelton v Shelton* [1945] Ch 158, [1945] 1 All ER 283; and PARA 115 note 10 ante.

4 For a list of possible base fees both under the old and the present law see Challis's Law of Real Property (3rd Edn) 326-330. The possibility of an interest in tail being partially barred so as to create a base fee is recognised by the Law of Property Act 1925 s 130(1) (repealed), although it will be an equitable interest.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/135. Creation of base fee by ineffectual statutory disposition.

135. Creation of base fee by ineffectual statutory disposition.

Where, at the time when a tenant in tail makes a disposition in fee simple under the Fines and Recoveries Act 1833, there is a protector of the settlement, and his consent is not given in accordance with the Act, the effect of the disposition is to bar the issue in tail but not the remainders, and thereby to create in favour of the grantee a base fee[1]. This base fee continues as long as there are issue in tail who would have inherited under the entail if they had not been barred, but on failure of such issue the base fee determines and the next estate in remainder takes effect in possession.

1 See the Fines and Recoveries Act 1833 s 34 (amended by the Statute Law Revision (No 2) Act 1888). For the purpose of the Fines and Recoveries Act 1833, 'base fee' means exclusively the estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming by way of remainder or otherwise are not barred: s 1.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/136. Power to enlarge base fee to fee simple absolute.

136. Power to enlarge base fee to fee simple absolute.

After the tenant in tail has created a base fee he has power to dispose of the land by assurance as against all persons, including the Crown, whose estates are to take effect after the determination or in defeasance of the base fee, and, if he does so, the base fee is thereby enlarged into a fee simple absolute[1]; but so long as there is a protector of the settlement, the tenant may not exercise the power without the protector's consent[2].

1 See the Fines and Recoveries Act 1833 s 19 (ss 19, 35, 58, 60, 61 amended by the Statute Law Revision (No 2) Act 1888). The tenant in tail may exercise this power notwithstanding that he has conveyed the base fee to a purchaser, and a covenant by him to do so may be specifically enforced against him: *Bankes v Small* (1887) 36 ChD 716, CA. In the event of the tenant in tail refusing to execute the deed it seems that a vesting order may be made under the Trustee Act 1925 s 48 (*Re Montagu, Faber v Montagu* [1896] 1 Ch 549: see TRUSTS vol 48 (2007 Reissue) PARA 883; or, perhaps, a person may be appointed to execute the deed under the Supreme Court Act 1981 s 39. For further discussion see Challis's Law of Real Property (3rd Edn) 338. As to the power of a trustee in bankruptcy to enlarge a base fee vested in the former tenant in tail who has become bankrupt see the Fines and Recoveries Act 1833 ss 57, 58, 60, 61 (as so amended; s 58 further amended by the Law of Property (Amendment) Act 1924 s 10, Sch 10; and the Statute Law (Repeals) Act 1969). As to the enlargement of a base fee into a fee simple by lapse of time see the Limitation Act 1980 s 27; and LIMITATION PERIODS vol 68 (2008) PARA 1041. As to enlargement by will see PARA 141 text and note 5 post.

2 See the Fines and Recoveries Act 1833 s 35 (as amended: see note 1 supra).

UPDATE

136 Power to enlarge base fee to fee simple absolute

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/137. Enlargement of base fee by union of estates.

137. Enlargement of base fee by union of estates.

If a base fee in land and the remainder or reversion in fee in the same land become united in the same person, and there is no intermediate estate between them, the base fee is not merged, but is thereupon enlarged into as large an estate as the tenant in tail could have created under the Fines and Recoveries Act 1833, with the consent of the protector, if any, if the remainder or reversion had been vested in any other person; that is, the base fee is usually enlarged into a fee simple absolute[1]. Thus the subsequent title to the fee simple is a continuation of the title to the estate tail, and not of the title to the reversion or remainder[2].

1 See the Fines and Recoveries Act 1833 s 39 (amended by the Statute Law Revision (No 2) Act 1888). As to the protector of the settlement see PARA 124 ante.

2 Under the old law a fine resulted in merger and let in incumbrances on the reversion (*Earl of Shelburne v Biddulph* (1748) 6 Bro Parl Cas 356, HL); a recovery enlarged the estate tail into a fee simple and shut out

incumbrances on the reversion. The Fines and Recoveries Act 1833 adopts the latter course: Hayes's Introduction to Conveyancing (5th Edn) 187.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/138. Creation of base fee by non-statutory disposition.

138. Creation of base fee by non-statutory disposition.

A base fee of a somewhat different character is created where a tenant in tail purports to convey the whole of his estate by an assurance not made under the Fines and Recoveries Act 1833. The assignee's estate is only effectual during the life of the tenant in tail, but he does not, on that account, take only an estate pur autre vie; he takes an estate of inheritance, which, however, is liable to be determined after the death of the tenant in tail by the entry of the heir in tail[1].

1 *Machil v Clark* (1702) 2 Salk 619; *Goodright d Tyrrell v Mead and Shilson* (1765) 3 Burr 1703 at 1705; *Doe d Neville v Rivers* (1797) 7 Term Rep 276; *Doe d Gregory v Whichelo* (1799) 8 Term Rep 211; *Sturgis v Morse* (1860) 2 De GF & J 223 at 231; *Hankey v Martin* (1883) 49 LT 560. See also *Stone v Newman* (1635) Cro Car 427 at 429; *Stapilton v Stapilton* (1739) 1 Atk 2 at 8. This appears to be settled, but Littleton speaks of the assurance by a tenant in tail as giving only an estate for the life of the tenant in tail, whether the assurance was by deed with livery of seisin (Littleton's Tenures ss 613, 650), or by grant only (Littleton's Tenures ss 617, 668). See *Case of Fines* (1602) 3 Co Rep 84a at 84b, and at 84b note (C).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(ii) Disentail/E. BASE FEES/139. Effect of statutory disposition upon voidable estate created by tenant in tail.

139. Effect of statutory disposition upon voidable estate created by tenant in tail.

If a tenant in tail creates a voidable estate in favour of a purchaser for valuable consideration, and subsequently makes a disposition of the land under the Fines and Recoveries Act 1833 with the consent of the protector, if any, this latter disposition, whatever may be its object, and whatever may be the extent of the estate thereby intended to be created, has the effect of confirming the voidable estate to its full extent, except as against persons having claims prior to the estate tail; and, if there is a protector and he does not consent, the voidable estate is confirmed to the extent of the base fee which the tenant in tail could create without such consent. However, if the statutory disposition is made to a subsequent purchaser for valuable consideration who has no express notice of the voidable estate, the voidable estate is not confirmed against him and his successors in title[1].

1 See the Fines and Recoveries Act 1833 s 38 (amended by the Statute Law Revision (No 2) Act 1888). The proviso to the Fines and Recoveries Act 1833 s 38 (as so amended) introduced a change in the former law under which the subsequent disentail necessarily confirmed a previous voidable assurance: *Capel's Case* (1593) 1 Co Rep 61b. See also the cases cited in Carson's Real Property Statutes (3rd Edn) 330. Under the Fines and Recoveries Act 1833 s 38 proviso, the rights of subsequent purchasers for valuable consideration without notice are preserved. The disposition referred to in s 38 proviso need not be contained solely in the enrolled deed. The term 'disposition' covers that and all other instruments by which the arrangement with the purchaser is carried out: *Crocker v Waine* (1864) 5 B & S 697. As to the previous law see *Crocker v Waine* supra at 718-719. A disentailing assurance by the tenant in tail operates to confirm the voidable estate, notwithstanding his intermediate bankruptcy, if there have been no dealings by his trustee in bankruptcy inconsistent with this result: *Hankey v Martin* (1883) 49 LT 560. As to the protector of the settlement see PARA 124 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(iii) Devolution on Death/140. Devolution upon heir in tail prior to 1926.

(iii) Devolution on Death

140. Devolution upon heir in tail prior to 1926.

A tenant in tail had before 1926 no power of testamentary disposition over the estate, and, if he had not executed a disentailing deed, it devolved upon his death on the heir in tail designated by the nature of the estate[1]. The heir was ascertained in accordance with the rules for ascertaining the heir general so far as these were consistent with the form of the limitation. The estate devolved immediately on the heir in tail, and did not vest in the first instance in the legal personal representatives of the deceased tenant in tail[2].

1 As to such descent of estate tail see EXECUTORS AND ADMINISTRATORS.

2 See the Land Transfer Act 1897 s 1 (repealed). The term 'real estate' used in s 1 was wide enough to include estates tail but the effect of the provision was limited by the words 'notwithstanding any testamentary disposition': see further EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(iii) Devolution on Death/141. Power of disposition by will.

141. Power of disposition by will.

Under the Law of Property Act 1925 a tenant in tail[1] of full age may dispose by will, by means of a devise referring specifically either to the property[2] or to the instrument under which it was acquired or to entailed property generally, of all property of which he is tenant in tail in possession at his death[3], and of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death[4], in like manner as if, after barring the entail, he had been tenant in fee simple or absolute owner of such property for an equitable interest at his death; but, subject to and in default of any such disposition by will, the property devolves in the same manner as if the enactment had not been passed[5]. Since the Inheritance Act 1833[6] remains in force for the purpose (so far as applicable) of ascertaining the devolution of entailed interests as equitable interests, this means that, so far as not disposed of by will, an entailed interest devolves as under the law before 1926, except that the devolution will be according to the general law then in force and not according to any special custom of descent[7].

1 In this context 'tenant in tail' includes the owner of a base fee in possession who has power to enlarge the base fee into a fee simple without the concurrence of any other person: Law of Property Act 1925 s 176(3).

2 See *Acheson v Russell* [1951] Ch 67, [1950] 2 All ER 572 ('all other my estate and interest in the family property at KH' sufficient).

3 Law of Property Act 1925 s 176(1)(a).

4 Ibid s 176(1)(b).

5 Ibid s 176(1). However s 176, which applies to entailed interests created under that Act, as well as to estates tail created before 1926, does not extend to a tenant in tail who is by statute restrained from barring or defeating his estate tail, whether the land or property in respect of which he is so restrained was purchased with money provided by Parliament in consideration of public services or not (see PARA 133 ante), or to a tenant in tail after possibility of issue extinct (see PARA 132 ante), and does not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities: s 176(2). But s 176 only applies to wills executed after 1925, or confirmed or republished by codicil executed after that year: s 176(4). See also *Re Price* [1928] Ch 579.

6 As to intestate succession and the old rules relating to the descent of real estate see EXECUTORS AND ADMINISTRATORS.

7 See the Law of Property Act 1925 s 130(4); and *Re Price* [1928] Ch 579. See also EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(iii) Devolution on Death/142. Devolution of the legal estate.

142. Devolution of the legal estate.

The legal estate in fee simple will be vested in the tenant in tail in possession at the time of his death in trust for the persons interested in the land[1], and whether he has disposed of the land by will or has suffered it to descend to the heir in tail, the legal estate will vest in the first instance in his personal representatives[2]. If he has disposed of the land and the land ceases to be settled land on his death, it will devolve upon his general personal representatives[3]; but, if he has not disposed of the land, so that the land passes to the heir in tail, or if the land otherwise continues to be settled land[4], it will ordinarily devolve upon the trustees of the settlement, as his special executors in regard to settled land if he has died testate[5], or as his special administrators if he dies wholly intestate[6].

1 As to the devolution of the legal estate see generally SETTLEMENTS.

2 See the Administration of Estates Act 1925 ss 1(1), 3(3).

3 See *Re Bridgett and Hayes' Contract* [1928] Ch 163; and EXECUTORS AND ADMINISTRATORS.

4 As to what is settled land and as to the duration of settlements see the Settled Land Act 1925 ss 1-3; and SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no settlement is deemed to be made under that Act on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

5 As to settled land grants see EXECUTORS AND ADMINISTRATORS.

6 As to settled land grants on the death of the tenant for life see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(2) ENTAILED INTERESTS/(iii) Devolution on Death/143. Vesting by personal representatives.

143. Vesting by personal representatives.

When the devolution of the legal estate to personal representatives, whether general or special, has been ascertained, the personal representatives will, subject to the land being required for payment of inheritance tax or other purposes of administration, vest it in the

persons who are entitled to hold it, whether beneficially or as trustees[1]. This vesting will be effected by assent or conveyance[2].

1 See the Settled Land Act 1925 s 7 (as amended), s 8(3); and SETTLEMENTS vol 42 (Reissue) PARA 698.

2 See ibid ss 7(1), 8(1). The assent must be in writing signed by the personal representatives: s 8(1). See further SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/A. HOW LIFE INTERESTS ARISE/144. Nature of life estate.

(3) LIFE INTERESTS

(i) Interest for the Life of the Tenant

A. HOW LIFE INTERESTS ARISE

144. Nature of life estate.

An estate for life, when it could exist as a legal estate, was an estate of mere freehold as distinguished from an estate of inheritance[1]. It can now exist only as an equitable interest, but the legal estate in fee simple is usually in the tenant for life in possession in addition to his equitable life interest[2]. The estate may be for the life of the tenant or for the life or lives of other persons. These estates are known as an estate or interest for life and an estate or interest pur autre vie respectively[3].

1 See 2 Bl Com (14th Edn) 104; and see generally paras 2, 108 et seq ante.

2 Prior to 1 January 1997, any instrument by virtue of which a life interest was created (other than behind a trust for sale in the proceeds of sale of land) was a settlement for the purposes of the Settled Land Act 1925 and, under that Act, the legal estate was required to be vested in the tenant for life: ss 1(1), 4(2), 6 (s 1(1) amended by the Married Women (Restraint upon Anticipation) Act 1949 s 1(4), Sch 2); and see generally SETTLEMENTS. Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new settlements under the Settled Land Act 1925: Trusts of Land and Appointment of Trustees Act 1996 s 2(1). Except in the case of existing settlements, life interests must now take effect behind a trust of land, where the legal estate will generally be vested in trustees: see s 1(1); and PARAS 65-66 ante.

3 Although a life estate now takes effect as an equitable interest, it is still frequently convenient to use the expression 'estate', and in a subject which depends on the old law, as well as the new, this avoids confusion. The alternative expressions are used in the Settled Land Act 1925 and the references there to 'tenant' imply the holding of an estate: see ss 19, 20, 22 (s 20 as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 761-764.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/A. HOW LIFE INTERESTS ARISE/145. How life interest is created.

145. How life interest is created.

An interest for the life of the tenant arises (1) by express or implied limitation; (2) formerly by operation of law, as in the case of tenancy by the curtesy or in dower[1]; and (3) by a tenant in

tail being reduced to the position of tenant for life in consequence of the possibility of issue in tail becoming extinct[2].

1 Tenancy by the curtesy and tenancy in dower can rarely arise in respect of deaths occurring after 1925. As to the nature of these tenancies see PARAS 157, 161 post.

2 As to such creation of a life interest see PARAS 146-148 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/A. HOW LIFE INTERESTS ARISE/146. Interest for life by express grant.

146. Interest for life by express grant.

An interest for life arises expressly where land is limited in trust for a person for his life[1]. Formerly, if an estate was given for life, but without mentioning whose life, it was presumed to be for the life of the grantee[2], unless the grantor had only power to grant an estate for his own life, and then the estate was for the life of the grantor[3]; and the same construction would apply to a settlement whereby the settlor creates a life interest.

An express interest for life may be limited so as to be determinable during the life on a specified event, such as a limitation to a woman during widowhood[4], and, although a clause merely prohibiting alienation is repugnant and void[5], yet the clause is effectual if it is expressed so as to make the interest determinable on bankruptcy or alienation[6].

1 As to land being limited in trust for a person for his life see SETTLEMENTS.

2 Co Litt 42a. This was upon the ground that the deed was to be taken most strongly against the grantor, an estate for a man's own life being treated in law as greater than an estate for the life of another: Co Litt 42a. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 242; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 241.

3 Thus, if a tenant in tail made a lease for life, not under an express or statutory power, without expressing for whose life, this was for his own life: Co Litt 42a, 42b.

4 Co Litt 42a.

5 *Brandon v Robinson* (1811) 18 Ves 429; *Rochford v Hackman* (1852) 9 Hare 475. See also GIFTS vol 52 (2009) PARA 254.

6 See the cases cited in note 5 supra. A person cannot limit his own property to himself for life until bankruptcy (*Higinbotham v Holme* (1812) 19 Ves 88; *Mackintosh v Pogose* [1895] 1 Ch 505), but he can limit it to himself for life until alienation (*Brooke v Pearson* (1859) 27 Beav 181; *Knight v Browne* (1861) 30 LJ Ch 649; *Re Perkins' Settlement Trusts, Leicester, Warren v Perkins* (1912) 56 Sol Jo 412), or until it is taken in execution (*Re Detmold, Detmold v Detmold* (1889) 40 ChD 585). See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 405 et seq; GIFTS vol 52 (2009) PARA 254. As to determinable life estates see also SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/A. HOW LIFE INTERESTS ARISE/147. Interest for life arising by implication.

147. Interest for life arising by implication.

An estate for life formerly arose by implication where land was granted by deed to a person without specifying what estate he was to take, or without using words of limitation which were proper to confer an estate of inheritance, whether in fee simple or in fee tail[1]. An estate for life may also arise by implication from the terms of a will in favour of a person to whom no estate is expressly devised[2], and, it seems, it may arise under a deed if that is the proper result of the language of the deed[3].

1 As to the grant of an estate in fee simple and words of limitation see PARA 93 ante.

2 Eg where a testator devised land to B after the death of A, and B was his heir-at-law: *Gardner v Sheldon* (1671) Vaugh 259; *Ralph v Carrick* (1879) 11 ChD 873 at 878, CA. See also WILLS vol 50 (2005 Reissue) PARA 752 et seq.

3 *Re Stanley's Settlement, Maddocks v Andrews* [1916] 2 Ch 50, where a life interest was implied in favour of the survivor of two tenants in common. It was formerly said that the implication might be only on a will or a deed taking effect under the Statute of Uses (1535) (repealed) not on a deed taking effect at common law: 1 Preston on Estates 190.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/A. HOW LIFE INTERESTS ARISE/148. Tenant in tail after possibility of issue extinct.

148. Tenant in tail after possibility of issue extinct.

A quasi-estate for life arises in the case of a tenancy in tail after possibility of issue extinct where lands are limited in special tail[1], and one of the persons from whom the issue is to proceed dies without issue of the specified class. Thus, where land is given to a man and his wife and the heirs of their bodies, and one of the spouses dies without issue, the survivor is tenant in tail after possibility of issue extinct[2]. Similarly, where land is given to a man and his heirs by a specified wife, the husband has a tenancy of this nature if the wife dies without issue by him[3]. Even if, in either case, there were at first issue surviving, the tenant in tail would become tenant after possibility of issue extinct upon death of the issue without issue[4]. The law does not presume impossibility of issue merely from the great age of the parties or one of them[5]. The estate cannot arise by express limitation or by the act of the parties, but only as the legal result of facts not depending on the will of the parties[6]. In quantity it is the same as an estate for life[7], but in quality it retains the nature of an estate tail so far that the tenant is not punishable for waste except equitable waste[8].

1 Littleton's Tenures s 34. See also PARA 118 ante.

2 Littleton's Tenures s 32. Note that no further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARAS 105, 119 ante.

3 Littleton's Tenures s 33.

4 Littleton's Tenures s 32.

5 Co Litt 28a. Cf the statutory presumption for the purposes of the rule against perpetuities: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1066.

6 *Bowles's Case* (1615) 11 Co Rep 79b at 80b. Thus, where land was given to a man and his wife and the heirs of their two bodies, and they were divorced, their estate of inheritance was turned into a joint estate for life: Co Litt 28a.

7 *Bowles's Case* (1615) 11 Co Rep 79b at 80b.

8 *Bowles's Case* (1615) 11 Co Rep 79b at 80a, 80b; Co Litt 27b, where other advantages of the tenancy are enumerated, but these are obsolete. Possibly his assignee is punishable for waste: Co Litt 28a note (6). As to equitable waste see SETTLEMENTS; and as to the non-liability of a tenant in tail for waste see PARA 117 note 8 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/B. ENJOYMENT AND ALIENATION/149. Rights of enjoyment.

B. ENJOYMENT AND ALIENATION

149. Rights of enjoyment.

A tenant for life has the right to the full enjoyment of the land during the continuance of his estate, subject to the duty of leaving it unimpaired for the remainderman. This duty is defined by the doctrine of waste. The extent of his rights and the application of the doctrine of waste are considered elsewhere[1].

1 See SETTLEMENTS; and see also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 431 et seq; MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 371-378.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(i) Interest for the Life of the Tenant/B. ENJOYMENT AND ALIENATION/150. Power of alienation.

150. Power of alienation.

Save under statutory powers, the tenant for life can dispose of the land only to the extent of his own interest. Thus, on a sale or gift of the land, whether expressed to be for the life of the tenant for life or any greater interest, the purchaser or donee takes an interest only for the rest of the life of the tenant for life, that is, an estate pur autre vie[1]; and, on a lease of the land, the lessee takes a term which is liable to be determined by the death of the lessor[2]. Under statutory powers, the tenant for life may dispose of the land by sale, exchange or lease, but any capital sum received on the transaction is paid to trustees or into court, and follows the limitations of the land[3].

1 As to an estate pur autre vie see PARA 151 et seq post. Although the assignee takes the beneficial interest in the land for the duration of the grantor's life, the statutory powers of a tenant for life under the Settled Land Act 1925 are not capable of assignment and remain exercisable by the grantor after notice to the assignee: see s 104(1), (4); and SETTLEMENTS vol 42 (Reissue) PARAS 777, 779.

2 As to such determination see LANDLORD AND TENANT.

3 As to such statutory powers see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 30 et seq; SETTLEMENTS. As to the devolution of the legal estate on the death of the tenant for life see PARA 142 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/151. Nature of estates pur autre vie.

(ii) Estate pur Autre Vie

151. Nature of estates pur autre vie.

Land may be held by the tenant for the term of another person's life, or for the term of several concurrent lives, and, in the second case, for the term of the joint lives or of the life of the survivor[1]. A term which is intended to be for the joint lives must be expressly so limited, otherwise it will be also for the life of the survivor[2]. The estate of the tenant was formerly an estate of freehold[3], and was called an 'estate pur autre vie'; the person whose life measures the estate was called the 'cestui que vie'[4]; and the expressions 'pur autre vie' and 'cestui que vie' are still appropriate, although the estate now takes effect as an equitable interest[5].

1 Littleton's Tenures s 56; Co Litt 41b; Challis's Law of Real Property (3rd Edn) 356. There may be an estate to A for the term of his own life and the lives of B and C: Co Litt 41b. On the death of A in the lifetime of B and C or either of them the estate does not determine, but continues, if A has assigned it, in favour of the assignee, and otherwise under the former law in favour of a special or general occupant, but now in favour of his personal representatives (see PARA 155 text and note 2 post) until the death of the survivor of B and C: *Dale's Case* (1590) Cro Eliz 182; *Rosse's Case* (1598) 5 Co Rep 13a. See also *Brudnel's Case* (1592) 5 Co Rep 9a. Ordinarily an estate for a person's own life is greater than an estate for the life of another, and thus an estate to A for the lives of A, B and C would be an estate for the life of A only; but in this case the usual rule does not apply: Co Litt 41b. See also PARA 146 ante. An estate pur autre vie might also be limited for the life of a person and the life of his heir: *Re Amos, Carrier v Price* [1891] 3 Ch 159.

2 *Brudnel's Case* (1592) 5 Co Rep 9a; *Rosse's Case* (1598) 5 Co Rep 13a. See also *Chatfield v Berchtoldt* (1872) 7 Ch App 192, where the estate was expressly so limited.

3 See *Doe d Blake v Luxton* (1795) 6 Term Rep 289 at 292, although an estate pur autre vie is not now a legal estate.

4 See Co Litt 41b.

5 Ie by virtue of the Law of Property Act 1925 s 1(1)-(3) (as amended): see PARAS 45-46 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/152. How estates pur autre vie are created.

152. How estates pur autre vie are created.

An estate pur autre vie may arise (1) by express limitation; and (2) by assignment of an existing life estate. It arises by express limitation when the trust is for the tenant for the specified life or lives[1], and before 1926 the technical nature of the estate was the same whether it was granted by way of conventional lease at a rent or whether it was created by way of settlement[2]. In either case the seisin was in the tenant, but in the former case the lessor reserved the succeeding estate to himself as his reversion, and to this the rent was incident; in the latter the succeeding estate was either a remainder or reversion. Now, however, a lease granted for lives at a rent takes effect as a lease for a term of 90 years determinable by notice on the falling of the last life[3], and an estate for the life of another created by way of settlement confers on the tenant pur autre vie a beneficial interest in equity only, although the legal estate may be vested in him on the trusts of the settlement.

An estate pur autre vie also arises when a tenant for his own life assigns his equitable estate to another[4]; the assignee is then tenant pur autre vie and the assignor becomes the cestui que vie[5]. The estate thus assigned may be either an estate originally created for life or an estate for life arising by operation of law, such as, formerly, a tenancy in dower[6].

1 The addition to the name of the tenant of words purporting to carry the estate on his death to his heirs did not alter the quantum of the estate, although it affected the beneficial interest in it after his death: see EXECUTORS AND ADMINISTRATORS.

2 See Challis's Law of Real Property (3rd Edn) 357.

3 See the Law of Property Act 1925 s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

4 Co Litt 41b.

5 Challis's Law of Real Property (3rd Edn) 357. An assignment by a tenant in tail after possibility of issue extinct creates an estate pur autre vie: Challis's Law of Real Property (3rd Edn) 357; 3 Preston on Conveyancing 171-172.

6 Co Litt 41b. As to dower see PARA 161 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/153. Rights of enjoyment.

153. Rights of enjoyment.

A tenant pur autre vie has the same rights of enjoyment as a tenant for his own life[1]. Generally, he is entitled to use the land as he pleases, subject to the restrictions imposed by the doctrine of waste[2], and he has the same right, notwithstanding waste, to take estovers[3]; but his enjoyment of the land may be restrained by special agreement[4]. In the case where the tenancy arises under a settlement under the Settled Land Act 1925, the tenant takes the rents and profits, and has special statutory powers of disposing of the land[5].

1 As to the rights of enjoyment of a tenant for life see PARA 149 ante; and SETTLEMENTS.

2 Co Litt 41b; *Seymor's Case* (1612) 10 Co Rep 95b at 98a. As to waste see SETTLEMENTS.

3 Co Litt 41b; *Seymor's Case* (1612) 10 Co Rep 95b. The tenant pur autre vie does not, it seems, forfeit his right to emblements by holding over after the death of the cestui que vie: *Kelly v Webber* (1860) 11 ICLR 57 at 61. Estovers are a liberty of taking necessary wood; as to emblements see AGRICULTURAL LAND vol 1 (2008) PARA 369.

4 Co Litt 41b; *Seymor's Case* (1612) 10 Co Rep 95b.

5 A tenant for the life of another, not holding merely under a lease at a rent, has, when his estate is in possession, the statutory powers of a tenant for life: Settled Land Act 1925 s 20(1)(v). See also SETTLEMENTS vol 42 (Reissue) PARA 762. As to the statutory restriction on the creation of new strict settlements on or after 1 January 1997 see PARA 65 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/154. Rights of alienation.

154. Rights of alienation.

A tenant pur autre vie, whether the estate is limited to him alone, or to him and his successors in title[1], has an absolute power to alienate his estate during his life, and upon his death during the life of the cestui que vie the estate of his assignee does not determine, but he continues to

hold for the remainder of the life of the cestui que vie in the same manner in all respects and subject to the same incidents as the assignor held[2].

1 Formerly this applied also where the limitation was to him and his heirs: see Co Litt 41b. This was so, although the estate pur autre vie was limited to the grantee and the heirs of his body: *Doe d Blake v Luxton* (1795) 6 Term Rep 289 at 292.

2 *Dale's Case* (1590) Cro Eliz 182. An estate pur autre vie might be limited by way of remainder (*Wastneys v Chappell* (1714) 3 Bro Parl Cas 50, HL), which, although contingent, did not, in the case of copyholds and leaseholds, require any prior estate to support it (*Pickersgill v Grey* (1862) 30 Beav 352); and a remainderman, if not barred, took as special occupant (*Allen v Allen* (1842) 2 Dr & War 307 at 325). However, it could not be entailed, although a quasi-entail might be effected (*Allen v Allen* supra; *Pickersgill v Grey* supra; *Re Barber's Settled Estates* (1881) 18 ChD 624 at 628), which might be barred by deed and otherwise (*Grey v Mannock* (1765) 2 Eden 339; *Lynch v Nelson* (1870) 5 IR Eq 192), but not by will (*Blake v Blake* (1786) 1 Cox Eq Cas 266; *Doe d Blake v Luxton* (1795) 6 Term Rep 289 at 292; *Campbell v Sandys* (1803) 1 Sch & Lef 281; *Hopkins v Ramage* (1826) Batt 365; *Cresswell v Hawkins* (1857) 3 Jur NS 407; *Walsh v Studdert* (1871) IR 5 CL 478; *Morris v Morris* (1872) IR 6 CL 73; *Re Barber's Settled Estates* (1881) 18 ChD 624 at 628). The power of alienation by successive takers was regulated by analogy to the rules governing similar limitations of an estate in fee simple. Thus, an executory devise could not be defeated by a prior tenant in quasi fee simple (*Re Barber's Settled Estates* supra); and where such a tenant conveyed his whole legal interest to trustees upon trusts which failed, there was a resulting trust of the beneficial interest to him, or to his heirs as special occupants (*Northen v Carnegie* (1859) 4 Drew 587).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/155. Devolution on death since 1925.

155. Devolution on death since 1925.

On the death of a tenant pur autre vie after 1925 the legal estate, if vested in him under the Settled Land Act 1925[1], devolves in the same manner as settled land, while the beneficial interest passes to his general personal representatives, as being an interest not ceasing on his death[2], and so far as not required for purposes of administration is disposed of by them in accordance with the will of the tenant, or if he died intestate as to the estate pur autre vie, then in accordance with the rules of intestate succession[3].

1 As to these provisions see PARA 153 note 5 ante.

2 See the Administration of Estates Act 1925 s 1(1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363 et seq. Before 1926 an estate pur autre vie devolved in accordance with the rules of occupancy, as amended by statute, but these were abolished by the Administration of Estates Act 1925 s 45(1)(a), except as regards a mentally disordered person of full age on 1 January 1926 who dies without having recovered testamentary capacity: see s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), (4), Sch 8 Pt I; and by virtue of the Mental Health Act 1983 s 148, Sch 5 para 29). As to occupancy see Challis's Law of Real Property (3rd Edn) 358 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 267 note 19; and EXECUTORS AND ADMINISTRATORS.

3 As to the rules of intestate succession see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(ii) Estate pur Autre Vie/156. Determination of estate pur autre vie.

156. Determination of estate pur autre vie.

Any person having any claim in remainder, reversion or expectancy may, upon affidavit showing that he has cause to believe that the cestui que vie is dead, and that his death is concealed, obtain an order of the High Court for his production by the tenant pur autre vie or his assignee[1], and if such order is not complied with the cestui que vie is taken to be dead, and any person claiming any interest in remainder, or reversion, or otherwise may enter accordingly[2].

A tenant pur autre vie who holds over after the death of the cestui que vie, without the express consent of the persons next entitled, becomes a trespasser and may be proceeded against accordingly[3].

The burden of proving that the cestui que vie is dead lies on the person next entitled. In the absence of direct evidence of death, the proof may be assisted by presumption of death[4]. If the cestui que vie remains beyond the seas or elsewhere absents himself in the realm for the space of seven years, the reversioner is entitled to recover the land in the absence of proof that he is alive[5]. If the supposed dead person is subsequently proved to have been living at the date of the eviction, the tenant pur autre vie who has been evicted may recover mesne profits with interest in respect of the period during which he was wrongfully out of possession[6].

1 *Re Hall, ex p Castledine* (1881) 44 LT 469; *Re Pople, ex p Baker* (1889) 40 ChD 589.

2 See the Cestui que Vie Act 1707 s 1. Remaindermen may apply notwithstanding that, in certain events, they are not immediately entitled on the death of the tenant for life: *Ex p Grant* (1801) 6 Ves 512. The order states the place at which, the time when, and the person before whom the cestui que vie is to be produced: *Ex p St Aubyn* (1793) 2 Cox Eq Cas 373; *Ex p Whalley* (1828) 4 Russ 561; *Re Lingen* (1841) 12 Sim 104; *Re Clossey* (1854) 2 Sm & G 46; *Re Pople, ex p Baker* (1889) 40 ChD 589; 2 Seton's Judgments and Orders (7th Edn) 1713. It appears that it is not necessary for the affidavit required by the statute to contain a statement that the death is concealed from the applicant: *Re Dennis' Will* (1860) 7 Jur NS 230. The order for production will be made if the remainderman gives notice to the person in possession to produce the cestui que vie under the statute, and the notice is not complied with: *Re Owen* (1878) 10 ChD 166. In default of production, a further order is made for the production before commissioners or to the court (*Re Lingen* supra; *Re Pople, ex p Baker* supra; 2 Seton's Judgments and Orders (7th Edn) 1713); and, if this is not complied with, a final order is made that the cestui que vie is to be deemed to be dead (*Re Pople, ex p Baker* supra; 2 Seton's Judgments and Orders (7th Edn) 1713). As to extending the time for production see *Re St John's Hospital* (1868) 18 LT 317. The court cannot give the tenant pur autre vie the costs of producing the cestui que vie (*Re Isaac* (1838) 4 My & Cr 11); nor will it give the applicant his costs, at any rate if the respondent had good reason for requiring him to come before the court (*Re Pople, ex p Baker* supra at 593). The statute applies to cases where the title of the remainderman depends on the death of the cestui que vie without issue (*Ex p Grant* supra; *Re Pople, ex p Baker* supra); to cases where the estate is for 99 years if the cestui que vie so long lives (*Ex p Grant* supra); and to cases where the person in possession has any interest determinable on a life, such as permissive occupation, although not an estate pur autre vie strictly so called (*Re Stevens* (1886) 31 ChD 320). As to procedure see further Daniell's Chancery Practice (8th Edn) 1866. The remainderman has, of course, to give up possession to the tenant pur autre vie if, after the order is made, the cestui que vie proves to be alive: *Re Pople, ex p Baker* supra at 592. As to an estate for a term determinable on life see now para 124 note 3 ante.

3 See the Cestui que Vie Act 1707 s 5 (amended by the Statute Law Revision Act 1888).

4 See *Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487, HL; *Re Owen* (1878) 10 ChD 166; *Re Clossey* (1854) 2 Sm & G 46. The order has been made on evidence of incurable illness of the cestui que vie when last heard of: *Re Dennis' Will* (1860) 7 Jur NS 230. As to presumption of death see CIVIL PROCEDURE vol 11 (2009) PARA 1100.

5 See the Cestui que Vie Act 1666 s 1.

6 See ibid s 4 (amended by the Statute Law Revision Act 1888).

UPDATE

156 Determination of estate pur autre vie

NOTE 2--Any reference to the Lord Chancellor and keeper or commissioners for the custody of the great seal of Great Britain for the time being in the Cestui que Vie Act

1707 s 1 is to be construed as a reference to a judge of the Chancery Division of the High Court: Constitutional Reform Act 2005 Sch 4 para 6.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(iii) Estate by the Curtesy/157. Nature of estate by the curtesy.

(iii) Estate by the Curtesy

157. Nature of estate by the curtesy.

Curtesy[1] was the right of a husband to an estate for his life, expectant on the death of his wife, in the entirety of land and hereditaments of the wife[2] of which she was seised for an estate of inheritance, subject to his having had issue by her born alive who were capable of inheriting the property from her[3]. As regards tenure, a tenant by the curtesy held of the heir[4]. Tenancy by the curtesy was in general abolished by the Administration of Estates Act 1925 in the case of a wife dying after 31 December 1925[5], but it can still arise on the death of a female tenant in tail who has not disposed of her entailed interest by will[6].

Curtesy may now exist in any property, real or personal, of which the wife was tenant in tail[7]. Since 1925 it is necessarily an equitable interest[8]. Formerly, in the case of land, it was necessary that the wife should obtain seisin in deed, that is, that she should enter[9]; seisin in law was not sufficient[10]. Although the wife's entailed interest now takes effect in equity, the necessity for seisin, or a corresponding necessity for possession, presumably still exists[11].

As soon as a child capable of inheriting[12] is born, the husband acquires a vested interest in his estate by the curtesy; and this is not divested by the subsequent death of the child[13], whether during the wife's life or after her death[14]. The issue must be born alive[15] during the marriage[16]; and this may be either before or after the wife is entitled to or seised of the property[17].

1 Ie an estate by the curtesy of England: Littleton's Tenures s 35.

2 As to the effect of marriage upon property generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 Littleton's Tenures ss 35, 52. In this context 'capable' means capable of inheriting the property from the wife by descent. Thus, if the wife was seised in fee simple or in tail general and had issue by her first husband, a second husband was nevertheless entitled to curtesy on issue being born to her by him, because the issue by the first husband might die: *Paine's Case* (1587) 8 Co Rep 34a. However, in the case of an estate in special tail, ie where the estate was limited to the wife and the heirs of her body by a particular husband, no other husband than the husband specified could in any circumstances be entitled to curtesy: Co Litt 19a. As to a limitation to the heirs male or the heirs female of the body of the wife see Co Litt 29b. If the property was subject to the custom of gavelkind (see PARA 14 ante), the curtesy was of a moiety only, the birth of issue was not necessary, and the estate ceased on the husband's remarriage: see Co Litt 30a; Bac Abr, Gavelkind (A); Robinson's Gavelkind (5th Edn) 128. As to curtesy in copyholds see PARA 34 head (4) ante.

4 Co Litt 45a; *Paine's Case* (1587) 8 Co Rep 34a at 36a.

5 Administration of Estates Act 1925 s 45(1)(b). The abolition does not affect the devolution of the estate of a mentally disordered person of full age on 1 January 1926 who dies without having recovered testamentary capacity: see s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), (4), Sch 8 Pt I; and by virtue of the Mental Health Act 1983 s 148, Sch 5 para 29). In this now necessarily very rare case, therefore, curtesy is still possible, and is governed by the pre-1926 law.

6 See the Law of Property Act 1925 ss 130(4), 176(1). As to a husband's rights of succession on the death intestate of his wife after 1925, and as to the court's power to order financial provision out of the estate of a deceased wife, see EXECUTORS AND ADMINISTRATORS.

7 See ibid s 130(1) (repealed with savings by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), (4), Sch 4). Formerly it was confined to realty: Co Litt 29a. It could always exist in the wife's separate property, both equitable (*Appleton v Rowley* (1869) LR 8 Eq 139) and statutory (*Hope v Hope* [1892] 2 Ch 336).

8 See the Law of Property Act 1925 s 1(1)-(3) (as amended); and PARAS 45-46 ante. Curtesy was always allowed in equitable estates but the husband was not allowed curtesy in an equitable estate or interest contrary to the express provisions of the trust (*Bennet v Davis* (1725) 2 P Wms 316), or to the clear intention of the settlor (see *Steadman v Palling* (1746) 3 Atk 423).

9 Co Litt 29a; *R v Great Faringdon Inhabitants* (1796) 6 Term Rep 679; *Doe d Andrew v Hutton* (1804) 3 Bos & P 643.

10 Co Litt 29a. Moreover it was not sufficient to obtain judgment in an action for the recovery of the land, if execution was stayed and the defendant remained in possession until the death of the wife: *Parks v Hegan* [1903] 2 IR 643. As to seisin in law and seisin in deed see PARA 167 post. In as much as seisin by the wife was necessary, there was no curtesy of a reversion or remainder expectant on a freehold interest which did not fall into possession during the marriage: Co Litt 29a. Formerly the wife must have been solely seised of the hereditaments or of an undivided share in them: *Doe d Neville v River* (1797) 7 Term Rep 276. Thus curtesy attached to a hereditament held by the wife as tenant in common or coparcener (Littleton's Tenures s 45; Co Litt 174b, 183a; *Palmer v Rich* [1897] 1 Ch 134 at 141), but not where she was joint tenant (Littleton's Tenures s 283; *Palmer v Rich* supra at 140).

11 As to seisin of equitable interests see PARA 167 note 2 post.

12 *Barker v Barker* (1828) 2 Sim 249 (devise to wife in fee, but if she should die leaving issue then to the issue and their heirs; wife died leaving issue: held, that the husband was not entitled to curtesy). See also *Boothby v Vernon* (1725) 9 Mod Rep 147; *Sumner v Partridge* (1740) 2 Atk 47; *Jones v Davies* (1861) 7 H & N 507, Ex Ch.

13 2 Bl Com (14th Edn) 127; and, similarly, as to a rentcharge in which the wife had an estate tail: Co Litt 30a.

14 *Paine's Case* (1587) 8 Co Rep 34a; *Steadman v Palling* (1746) 3 Atk 423.

15 As to proof of live birth see *Brock v Kellock* (1861) 3 Giff 58; *Jones v Ricketts* (1862) 31 Beav 130.

16 *Paine's Case* (1587) 8 Co Rep 34a; Co Litt 20b; *Basset v Basset* (1744) 3 Atk 203 at 207; *Goodtitle d Newman v Newman* (1774) 3 Wils 516. It has been said that birth by Caesarean operation would not give curtesy (Co Litt 29b); sed quaere.

17 Co Litt 29b; Perkins on the Laws of England s 473.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(iii) Estate by the Curtesy/158. Rights and powers of tenant by the curtesy.

158. Rights and powers of tenant by the curtesy.

The incidents of an estate for life are, generally speaking, the same whether the estate arises by act of the parties or by operation of law[1]. Thus, a tenant by the curtesy is under the same liability for waste as any other tenant for life impeachable for waste[2], and he must keep down the interest on incumbrances[3]. On the other hand, he has the rights of a tenant for life in respect of the enjoyment of the property during his life.

A tenant by the curtesy has the statutory powers of sale, exchange and leasing of a tenant for life of settled land[4], his estate or interest being deemed, for the purposes of the Settled Land Act 1925, to be an estate or interest arising under a settlement made by the wife[5]. Apart from the statutory powers, a lease granted by a tenant by the curtesy is absolutely determined by his death[6].

1 2 Bl Com (14th Edn) 122.

2 Co Litt 53a: see PARA 149 ante. A tenant by the curtesy was liable for waste at common law before the statutory liability was imposed on tenants for life generally (see SETTLEMENTS), and he remained under the liability even after he had assigned his estate (*Walker's Case* (1587) 3 Co Rep 22a at 23b).

3 *Casborne v Scarfe* (1738) 1 Atk 603 at 606. He takes, of course, subject to all incumbrances affecting the estate of the wife.

4 Settled Land Act 1925 s 20(1)(vii).

5 Ibid s 20(3). See also SETTLEMENTS vol 42 (Reissue) PARA 762.

6 *Miller v Manwaring* (1635) Cro Car 397. However, a lease by a tenant by the curtesy may be valid in favour of a lessee acting in good faith, notwithstanding that it does not purport to be granted in pursuance of the enactments relating to settled land: *Mogridge v Clapp* [1892] 3 Ch 382, CA; *Re Morgan's Lease, Jones v Norsesowicz* [1972] Ch 1, [1971] 2 All ER 235. As to the powers of a tenant for life generally see SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(iii) Estate by the Curtesy/159. Estate by the curtesy defeated by wife's disposition.

159. Estate by the curtesy defeated by wife's disposition.

The right of curtesy may be barred by a marriage settlement, or a contract between husband and wife[1], or by the wife disposing of the property by deed or will, or contracting to dispose of it[2], or enlarging her entailed interest into an absolute interest[3].

1 *Shurmur v Sedgwick, Crossfield v Shurmur* (1883) 24 ChD 597. As to marriage settlements in general see also SETTLEMENTS. As to contracts between husband and wife see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 206.

2 *Cooper v Macdonald* (1877) 7 ChD 288, CA; *Hope v Hope* [1892] 2 Ch 336.

3 As to disentail generally see PARA 121 et seq ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(iii) Estate by the Curtesy/160. Effects of divorce and judicial separation on estate by the curtesy.

160. Effects of divorce and judicial separation on estate by the curtesy.

The right of curtesy is defeated by a decree for dissolution of marriage[1]. In the case of a decree of judicial separation, property acquired by or devolving upon the wife on or after the date of the decree devolves, on her death intestate, as though her husband were dead, so that the husband has no right to curtesy in any such property as long as the separation lasts[2].

It has been held that the right of curtesy is not affected, apart from a decree of judicial separation, by the fact of the husband leaving the wife and living in adultery[3].

1 *Wilkinson v Gibson* (1867) LR 4 Eq 162; *Prole v Soady* (1868) 3 Ch App 220. As to the court's power to order financial provision out of the estate of a deceased divorced wife see the Inheritance (Provision for Family and Dependants) Act 1975 ss 1, 2 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq. As from a date to be appointed under the Family Law Act 1996 s 67(3), decrees for divorce and judicial separation are replaced by divorce and separation orders: see s 2.

2 See the Matrimonial Causes Act 1973 s 18(2) (repealed by the Family Law Act 1996 s 66(3), Sch 10 as from a date to be appointed under s 67(3) and replaced as from that date by s 21); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 209. See also note 1 supra.

3 *Sidney v Sidney* (1734) 3 P Wms 269 at 276; *Re Walker* (1835) L & G *temp* Sugd 299 at 326; sed quaere.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(3) LIFE INTERESTS/(iv) Estate in Dower/161. Nature of dower.

(iv) Estate in Dower

161. Nature of dower.

Dower at common law was the right of a wife on surviving her husband to an estate for her life in one-third part of the freehold estates of inheritance[1] of which her husband was solely seised at any time during the marriage and to which her issue by him might possibly have been the heir-at-law[2]. It was not necessary, as in the case of curtesy, that actual issue should be born in order to entitle the wife to dower; it was sufficient that issue capable of inheriting might have been born of her[3]. Dower was abolished by the Administration of Estates Act 1925 in the case of a husband dying after 31 December 1925[4].

1 See *Jones v Jones* (1832) 2 Cr & J 601.

2 2 Bl Com (14th Edn) 131; Littleton's Tenures ss 36-53. By the custom of gavelkind, the dower extended to a moiety of the husband's estates of inheritance, but continued only so long as the widow remained chaste and unmarried: see Bac Abr, Gavelkind (A); Robinson's Gavelkind (5th Edn) 139 et seq. By the custom of borough english it might extend to the whole: Littleton's Tenures s 166.

3 Thus, if the husband had an estate in tail special to him and the heirs of his body by a particular wife, that wife was dowable, although the husband died without issue by her, for the issue, had there been any, would have inherited; but, if the wife died and the husband remarried, the second wife was not dowable: Littleton's Tenures s 53; *Paine's Case* (1587) 8 Co Rep 34a at 36a.

4 See the Administration of Estates Act 1925 s 45(1)(c). The abolition of dower by this enactment does not affect the devolution of an entailed interest: s 45(2). However, it is generally thought that dower cannot now arise out of an entailed interest (which can only exist as an equitable interest), because dower out of equitable interests was not possible apart from the Dower Act 1833 ss 1, 2 (repealed as regards deaths after 1925 by the Administration of Estates Act 1925 s 56, Sch 2, Pt I): see Wolstenholme and Cherry's Conveyancing Statutes (13th Edn) vol 3, 30; Megarry and Wade's Law of Real Property (5th Edn) 557. See also the Law of Property Act 1925 s 130(4); and PARA 141 ante. Nevertheless it has been suggested that an inchoate right to dower which attached to an entailed interest before 1926 remains good although the tenant in tail dies after 1925 (Wolstenholme and Cherry's Conveyancing Statutes (13th Edn) vol 3, 30); and cf Hood and Challis's Property Acts (8th Edn) 717; 74 Sol Jo 50, 361. The abolition of dower does not affect the devolution of the estate of a mentally disordered person of full age on 1 January 1926 who dies without having recovered testamentary capacity (see the Administration of Estates Act 1925 s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), (4), Sch 8 Pt I; and by virtue of the Mental Health Act 1983 s 148, Sch 5 para 29); and in this now necessarily very rare case, therefore, dower is still possible, and is governed by the pre-1926 law (as to which see Megarry and Wade's Law of Real Property (5th Edn) 544-546). As to a wife's rights of succession on the death intestate of her husband after 1925, and as to the court's power to order financial provision out of the estate of a deceased husband, see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(i) Nature of a Future Interest/162. Particular estates and remainders.

(4) FUTURE INTERESTS

(i) Nature of a Future Interest

162. Particular estates and remainders.

Before 1926, the legal estate in fee simple in land could be divided into two or more successive estates[1]. The first was the estate in possession, and was called the 'particular estate'[2]. This might be an estate for years, an estate for life or an estate tail[3]. If there was only one subsequent estate, it was still an estate in fee simple, but not necessarily in possession. If by one deed[4] the grantor granted the particular estate to one person and the subsequent estate to another, the subsequent estate was called a 'remainder'[5]; otherwise the subsequent estate continued in the grantor and was called a 'reversion'[6]. If a succession of estates was granted, all the estates between the particular estate and the ultimate estate were remainders. The ultimate estate was always an estate in fee simple and was either a remainder or reversion, according to whether it was granted out or continued in the grantor[7]. In a real estate settlement the land was usually limited for one or more successive life estates, followed by a succession of estates tail, with an ultimate reversion to the settlor and his heirs. The estate of the settlor was the original estate; the estates which he carved out of it were derivative estates[8].

1 Similarly an estate less than a fee simple could be divided into an estate smaller than itself with remainders or reversion over. Thus an estate for life (see PARA 144 et seq ante) admitted of a term being limited out of it, even for 1,000 years, since in law a freehold was a greater estate than a term of years (Co Litt 46a; *Earl of Derby v Taylor* (1801) 1 East 502); and an estate pur autre vie (see PARA 151 et seq ante) could be limited to persons in succession (*Low v Burron* (1734) 3 P Wms 262; *Pickersgill v Grey* (1862) 30 Beav 352).

2 Co Litt 143a.

3 Fearne's Contingent Remainders 3 note (c).

4 Fearne's Contingent Remainders 382; Challis's Law of Real Property (3rd Edn) 78. See also 2 Bl Com (14th Edn) 167.

5 A remainder was 'a residue of an estate in land depending upon a particular estate, and created together with the same': Co Litt 49a (see also 143a); 1 Preston on Estates 90. Etymologically and historically it was so called not because it remained over, but because it remained out when the particular estate came to an end: 2 Pollock and Maitland's History of English Law (2nd Edn) 21-22.

6 'A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate': Co Litt 22b. It was so called because the land returned to the grantor on the determination of the particular estate. The effect was the same whether the grant was silent as to the residue of the estate or reserved it to the grantor as a reversion or remainder. The reversion mentioned here gives no present interest in the land and differs from the reversion on a term of years at a rent. Where a lease has been granted, the lessor ceases to be entitled to the actual possession of the land, but he retains a reversion to which the rent is incident; the species of possession known as seisin (see PARA 167 post) is in him, and as to matters depending on seisin, the reversion ranks as an estate in possession. The reversion and the term subsist concurrently as legal estates: see PARA 47 ante. The reversion is properly described as being the freehold in possession subject to the term: Challis's Law of Real Property (3rd Edn) 100. See also Littleton's Tenures s 60.

7 See Fearne's Contingent Remainders 4 note (4).

8 Challis's Law of Real Property (3rd Edn) 68. For a list of the particular estates which could be derived out of estates less than the fee simple see Challis's Law of Real Property (3rd Edn) 72-74. However, in practice settlements were usually made by carving estates out of the fee simple.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(i) Nature of a Future Interest/163. Possibility of reverter of future interests.

163. Possibility of reverter of future interests.

The grant of a fee simple, notwithstanding that it was determinable, was in law considered as the grant of the whole fee[1]. Consequently, there was no remnant of the fee left for the grantor to grant as a remainder, nor was there any reversion in himself, but, in the case of determinable fees, he had an interest which was called a 'possibility of reverter'[2]. A fee simple absolute generally only determined for want of heirs, and then went to the lord by escheat[3].

1 Fearne's Contingent Remainders 13n.

2 Fearne's Contingent Remainders 381 note (a). As to possibilities of reverter see PARA 115 ante. The term 'possibility of reverter' has also been applied to the possibility that a common law fee may return to the grantor on breach of a condition subject to which it was granted: see Challis's Law of Real Property (3rd Edn) 76, 83, 228. However, the grantor's interest in this case is more usually termed a 'right of entry': see Fearne's Contingent Remainders 382 note (a); and cf the Law of Property Act 1925 s 4(2), (3); and PARA 46 ante. As to fees upon condition see PARAS 97-99, 114 note 2 ante. As to determinable fees see PARA 114 et seq ante.

3 As to escheat see PARAS 6 ante, 254 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(i) Nature of a Future Interest/164. Creation of remainder or reversion in grantor.

164. Creation of remainder or reversion in grantor.

At common law a tenant in fee simple could not limit the fee so as to create an ultimate remainder in himself or his heirs. Such a remainder was void, and the grantor retained the ultimate estate as a reversion[1]. However, by statute, the grantor under such a limitation took the ultimate estate as a purchaser by virtue of the assurance, and was not considered as entitled to it as of his former estate or part of it[2].

An owner in fee simple who granted out the whole fee in successive estates divested himself entirely of the feudal tenure, just as if he granted the fee simple as a single estate; and the grantee of the particular estate held of the superior lord and not of the remainderman. However, if the owner granted only a particular estate and kept the reversion in himself, the grantee of the particular estate held of him. Where rent was reserved, this was incident to the reversion and passed on a grant of the reversion unless excepted.

1 Co Litt 22b; 2 Bl Com (14th Edn) 176; *Fennick v Mitford* (1589) 1 Leon 182; *Read v Erington* (1594) Cro Eliz 321; *Bingham's Case* (1601) 2 Co Rep 91a at 91b. 'A man cannot either by conveyance at the common law by limitation of uses, or devise, make his right heir a purchaser': *Pibus v Mitford* (1674) 1 Vent 372; Fearne's Contingent Remainders 51. See also *Earl of Bedford v Russel* (1593) Poph 3; *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 130a; *Godbold v Freestone* (1694) 3 Lev 406. However, under an executory trust, such as a direction to convey in a certain event to the heirs of the grantor, the person who answered the description of heir at the time when the event happened might take as purchaser: *Locke v Southwood* (1831) 1 My & Cr 411; on appeal sub nom *Bush v Locke* (1834) 3 Cl & Fin 721, HL.

2 See the Inheritance Act 1833 s 3 (amended by the Statute Law Revision (No 2) Act 1888). The rule in question, under which the heir could not take as purchaser, was confined to cases of remainders, and under an executory limitation (see PARAS 173-174 post) the heir could take as purchaser (see *Loyd v Carew* (1697) Prec Ch 72; Fearne's Contingent Remainders 275-276); and perhaps the Inheritance Act 1833 operated only where

the grantor would formerly have been in of his former estate; so that an executory limitation to the heirs of the grantor would still take effect in favour of the heir as persona designata (ie as an individual as distinguished from a member of a class) and not in favour of the grantor. The rules of descent have been abolished (see the Administration of Estates Act 1925 s 45(1)(a)), but the Inheritance Act 1833 remains in force for the purpose of ascertaining the persons who are to take equitable interests as heirs by purchase (see the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 1).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(i) Nature of a Future Interest/165. Remainders are now equitable interests.

165. Remainders are now equitable interests.

The various successive estates, particular estates and remainders or reversions which could formerly subsist at law could also subsist in equity as equitable estates. This was so where, under a settlement or will, land was vested in trustees on trust for persons entitled to successive interests[1]; and now that an estate in fee simple absolute is the only estate of freehold which can subsist at law[2], particular estates and remainders and reversions are necessarily equitable, and, in the Law of Property Act 1925, are placed in the general class of equitable interests[3].

1 As to equitable estates formerly following the analogy of legal estates see EQUITY vol 16(2) (Reissue) PARAS 554-555.

2 As to legal estates see PARA 45 ante.

3 See the Law of Property Act 1925 ss 1(3), 205(1)(x) (as amended); and PARA 46 note 2 ante. The class includes both estates and interests not accompanied by any estate; equitable estates such as an estate tail; and interests such as an equitable charge. The remainders and reversions referred to in the text, being formerly parts of the legal estate in fee simple, were described as 'estates'. It is now convenient in accordance with the post-1925 arrangement of estates and interests to describe them as 'equitable interests'.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(i) Nature of a Future Interest/166. Vested and contingent interests.

166. Vested and contingent interests.

A future interest in the form of a remainder or a reversion waits for the determination of a preceding estate, and is either vested or contingent: vested, if it is ready to take effect in possession immediately the preceding estate determines; contingent, if for the time being it is uncertain if it will ever take effect at all[1]. There are also future interests which do not wait for the determination of a preceding estate. They may arise even where no preceding estate is limited by the settlement; they are then called 'springing interests'; or they may defeat a preceding estate and then they are 'shifting interests'. These springing and shifting interests could not be created by deed operating at common law, but they could be created by will or under the Statute of Uses[2]. When created by will, they were executory devises[3] and might be either springing or shifting. When created under the Statute of Uses, they were springing and shifting uses[4]. Under the former law they were carefully distinguished, and the beneficial rights might vary according to whether an interest was a remainder or was executory, and for the purpose of showing the relationship between the old law and the new it is convenient still to

treat them separately. However, the important distinction now is between vested and contingent future interests. Both alike take effect as equitable interests[5].

1 An estate is vested when there is an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment. An estate is vested in interest when there is a present fixed right of future enjoyment. An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain: Fearne's Contingent Remainders 2. The term 'vested' by itself is often used in the sense of 'vested interest': see further Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 277 et seq; and PARA 169 post. However, in some contexts the meaning of 'vested' is rather narrower: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1019.

2 Ie under the Statute of Uses (1535) (repealed): see PARA 24 ante.

3 As to executory interests see PARAS 173-178 post.

4 As to springing and shifting uses see PARAS 179-182 post.

5 See the Law of Property Act 1925 s 1(3); and PARA 46 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(ii) Remainders/167. Seisin and possession.

(ii) Remainders

167. Seisin and possession.

An owner in possession for an estate of freehold[1] is said to be 'seised' of the land, and his possession is called 'seisin'[2]. 'Possession', as applied to land, denotes, in its narrowest meaning, possession for a chattel interest; thus, as between the freeholder and the lessee, the freeholder is seised and the lessee possessed of the land. The possession of the lessee supports the seisin of the lessor[3]. In a wider sense, 'possession' denotes occupation under any title, whether of freehold or leasehold, or even without title[4], and it may include receipt of rent[5].

Seisin may be either seisin in deed or seisin in law[6]. A person in actual possession of land or in receipt of rent from the occupying tenant under a freehold title has seisin in deed[7]. An heir-at-law becoming entitled to the freehold on the death of an ancestor who died seised had seisin in law if the actual possession was then vacant[8]. If a tenant was in possession, the possession of the tenant was credited to the heir, even though no rent had been received by him, and the heir had an immediate seisin in deed[9]. Similarly a devisee had at once a seisin in law if the possession were vacant[10], and, apparently, a seisin in deed if a tenant was in possession. Now, however, while land is vested in the legal personal representatives of the deceased under the Administration of Estates Act 1925, the seisin of the devisee, whether in deed or in law, is excluded[11].

1 Estates of freehold tenure were estates in fee simple, estates in fee tail and estates for life: Co Litt 43b. Of these estates only an estate in fee simple can now subsist at law, and for this purpose it must be the fee simple absolute: see PARA 45 ante. As to seisin of copyholds see *Re Norman, Thackray v Norman* (1914) 111 LT 903; and as to seisin of a former mortgagee of customary freeholds see *Copestake v Hoper* [1908] 2 Ch 10 at 17, CA.

2 Co Litt 17a. In early times 'seisin' and 'possession' were synonymous, and it was customary to speak of seisin of chattels as well as seisin of land: see 1 LQR 324; and PARA 9 ante. As to seisin generally and possession of chattels see 2 Pollock and Maitland's History of English Law (2nd Edn) 29 et seq, 150 et seq; 2 Holdsworth's History of English Law 263; 7 Holdsworth's History of English Law 23 et seq. There can now be legal seisin only in respect of the fee simple, but estates of freehold subsisting in equity were formerly treated as conferring an equitable seisin: *Burgess v Wheate* (1759) 1 Eden 177. However, since an equitable tenant for life or in tail usually has the legal estate in fee simple vested in him and is seised in respect of that estate, equitable seisin is practically obsolete.

3 See *Bushby v Dixon* (1824) 3 B & C 298.

4 As to such possession of land see LIMITATION PERIODS vol 68 (2008) PARA 1078 et seq.

5 See the Law of Property Act 1925 s 205(1)(xix); and the Settled Land Act 1925 s 117(1)(xix).

6 As to the distinction see Co Litt 266b, Butler's note (1); *Leach v Jay* (1878) 9 ChD 42, CA; *Eager v Furnivall* (1881) 17 ChD 115 at 120. The distinction applies both to corporeal and incorporeal hereditaments: Challis's Law of Real Property (3rd Edn) 233; *Murray v Thorniley* (1846) 2 CB 217 at 223, 224. The importance of the distinction lay mainly in regard to the rights of property which depended on seisin. Thus, seisin in deed is necessary to give curtesy, whereas seisin in law was sufficient for dower: see PARA 157 ante; and 2 Pollock and Maitland's History of English Law (2nd Edn) 433.

7 This is the same as Coke's 'actually seised'; that is, either by entry, or by possession of the lessee for years, or the like: Co Litt 243a. Furthermore, as against an adverse claimant, exclusive occupation is not necessary to give seisin in deed. Entry on the land by the person entitled to the freehold vests in him, for legal purposes, the actual possession, and consequently the seisin in deed, notwithstanding that an adverse claimant is on the land: *Reading v Royston* (1703) 1 Salk 242; *Jones v Chapman* (1849) 2 Exch 803 at 821; *Lows v Telford* (1876) 1 App Cas 414, HL. See also Littleton's Tenures ss 417-418, 701.

8 It was the same whether the ancestor was lawfully entitled or not. If he was actually seised, although as a disseisor, a seisin in law was cast upon his heir: Littleton's Tenures s 448. Seisin in deed, although wrongful, is a root of title: see PARA 267 post.

9 Co Litt 15a, 243a; *Goodtitle d Newman v Newman* (1774) 3 Wils 516; *Bushby v Dixon* (1824) 3 B & C 298; *Tuthill v Rogers* (1844) 1 Jo & Lat 36 at 76; *Lyell v Kennedy, Kennedy v Lyell* (1889) 14 App Cas 437 at 456, HL. See also *De Grey v Richardson* (1747) 3 Atk 469 (tenancy by the curtesy).

10 Co Litt 111a.

11 See the Administration of Estates Act 1925 s 1(1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363 et seq.

168. Former rules for the creation of remainders.

Limitations of land operating at common law were subject to the rule that there must always be a tenant of the freehold; in other words, the freehold must never be in abeyance[1]. Consequently, an estate of freehold could not at common law[2] be limited to commence in the future[3] save by way of remainder after a particular estate, and a remainder could not be limited so as to vest in possession at a date later than the determination of the preceding estate[4]. The provision of the Law of Property Act 1925[5] that the estate in fee simple absolute in possession is the only estate of freehold at law at once prevents the freehold from being in abeyance and prevents the creation of a remainder as a legal estate.

An estate in remainder, when it could subsist at law, required to be so limited that it would wait for the regular determination of the particular estate, and would not take effect until that determination[6]. For this purpose, the particular estate might expire either in accordance with a direct or a collateral limitation[7]. In either case, the particular estate expired in accordance with its limitation, and the estate limited to follow it was a remainder[8]. An interest limited to defeat an existing estate was an executory interest and could not be created at common law by deed[9].

1 This is because there must, in theory, always be a person responsible for the services incident to the tenure of the land, and against whom a claimant to the land might bring a real action: *Freeman d Vernon v West* (1763) 2 Wils 165. The rule survived these reasons, and it became an absolute rule that the immediate

freehold could not be placed in abeyance by any act of the parties (1 Preston on Estates 216), although it might, in certain cases, be placed in abeyance by operation of law. This could happen eg where a corporation sole was seised of land and the freehold was in abeyance between the death of one incumbent and the appointment of his successor.

2 *Buckler's Case* (1597) 2 Co Rep 55a; *Barwick's Case* (1598) 5 Co Rep 93b; *Freeman d Vernon v West* (1763) 2 Wils 165; 2 Bl Com (14th Edn) 165; 1 Preston on Estates 217, 219, 253; 2 Preston on Estates 126, 146. See also *Throckmerton v Tracey* (1555) 1 Plowd 145 at 156; *Hogg v Cross* (1591) Cro Eliz 254; *Swyft v Eyres* (1640) Cro Car 546.

3 The rule applied to all forms of conveyance of corporeal hereditaments operating at common law (see *Roe d Wilkinson v Tranmarr* (1758) Willes 682), except perhaps, common law exchanges (Perkins on the Laws of England s 265; 1 Preston on Estates 217 note (d); Challis's Law of Real Property (3rd Edn) 106), which, however, do not now occur in practice: see PARA 240 post. The rule applied, apparently by way of analogy (Challis's Law of Real Property (3rd Edn) 112), to conveyances of existing incorporeal hereditaments (1 Preston on Estates 217); and it applied to corporeal hereditaments after they lay in grant (Challis's Law of Real Property (3rd Edn) 109 et seq). However, an incorporeal hereditament, such as a rentcharge, could be limited to arise at a future time. It was the creation of the grantor, who might grant it in what form he pleased: *Throckmerton v Tracey* (1555) 1 Plowd 145 at 156; *R v Kempe* (1695) 1 Ld Raym 49 at 52. See also *Sutton's Hospital Case* (1612) 10 Co Rep 1a, 23a at 27b, Ex Ch. It followed that desultory limitations, ie limitations creating estates or interests to arise at intervals and not to exist continuously, were possible on the creation of incorporeal hereditaments, but not on the grant of corporeal hereditaments or existing incorporeal hereditaments: *Corbet's Case* (1600) 1 Co Rep 83b at 87a; *The Prince's Case* (1606) 8 Co Rep 1a at 13b, 17a; *Atkins v Mountague* (1671) 1 Cas in Ch 214; Challis's Law of Real Property (3rd Edn) 113. However, now that an incorporeal hereditament can only subsist at law when it is in possession, the distinction is obsolete: see the Law of Property Act 1925 s 1(2) (as amended); and PARA 45 ante.

From the rule that an estate of freehold could not be made to commence in the future, it followed that a conveyance was not effectual unless at the same moment that the freehold was divested out of the grantor it was vested in the grantee. Consequently, where a feoffment purported to create a future estate, the livery was void. A feoffor could not make present livery to a future estate, and nothing passed (*Barwick's Case* (1598) 5 Co Rep 93b at 94b); although this might be avoided by not making the livery until after the day fixed for the commencement of the estate (1 Preston on Estates 222), or, after land lay in grant, by delaying delivery of the deed, since the deed takes effect from delivery: see Challis's Law of Real Property (3rd Edn) 107; and DEEDS AND OTHER INSTRUMENTS.

4 Such a limitation, as much as an original limitation, infringed the rule that the freehold must not be in abeyance. The existence of a gap between the particular estate and the remainder was the usual cause of failure of contingent remainders: *Cunliffe v Brancker* (1876) 3 ChD 393, CA; *White v Summers* [1908] 2 Ch 256 at 265. See further PARAS 170-171 post.

5 See the Law of Property Act 1925 s 1(1); and PARA 45 ante.

6 *Colthirst v Bejushin* (1550) 1 Plowd 21 at 23-24, in the course of argument; Fearne's Contingent Remainders 10 (note (b)), 261; Challis's Law of Real Property (3rd Edn) 81.

7 As to collateral limitations see PARA 115 ante.

8 Thus an estate granted to a man while he continued unmarried determined on his marriage, and admitted of a remainder being limited upon it: 2 Bl Com (14th Edn) 155; Challis's Law of Real Property (3rd Edn) 82.

9 As to executory interests see PARA 179 et seq post. As to the effect on a remainder of the particular estate being limited subject to a condition see *Colthirst v Bejushin* (1550) 1 Plowd 21 at 29, in the course of argument; Fearne's Contingent Remainders 262, 270 et seq; Challis's Law of Real Property (3rd Edn) 81-82. Since the fee simple exhausts the possible duration of the tenure, no remainder could at common law be limited after a fee simple. 'Two fee simples absolute cannot be of one and the selfsame land': Co Litt 18a; *Willion v Berkley* (1561) 1 Plowd 223 at 248. See also PARAS 115, 162 et seq ante. Moreover, it seems that this is so, whether the fee simple is absolute or determinable: *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170 at 180. The only interest that can exist after a fee simple at common law is a possibility of reverter: see PARA 163 ante. As to limiting alternative fees after a particular estate see PARA 169 et seq post. However, an estate could be limited by way of shifting use so as to defeat a fee simple or to take effect after a determinable fee: see PARA 181 note 6 post.

169. Vested remainders.

Remainders are either vested or contingent[1], according to whether they are or are not ready for the time being to take effect in possession in the event of the determination of all the preceding estates, whether by natural expiration or otherwise. The remainder may in fact determine before the preceding estates and thus never take effect in possession, but this does not prevent it from being vested. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent[2].

A vested remainder may be limited upon a preceding term of years. The seisin is immediately in the remainderman, who holds subject to the term. Consequently the limitation does not place the freehold in abeyance[3].

A remainder may be vested notwithstanding that there are contingent remainders limited between it and the particular estate, provided none of the contingent remainders is a remainder in fee simple. Thus, on a limitation to A for life, remainder to an unborn person in tail, remainder to C in fee, C has the first vested estate on inheritance; but, upon a tenant in tail coming into existence, his estate vests by interposition between the life estate, if then subsisting, and the remainder in fee simple[4]. However, if the contingent limitation is in fee simple, no estate limited after it can be vested[5], although different contingent remainders may be limited alternatively on the same particular estate[6]. These remainders can now only subsist as equitable interests[7].

Where the estate in the land expectant on a particular estate is subject to a power of appointment and there is a remainder limited in default of appointment, the remainder, when otherwise ready to vest, is not prevented from doing so by the existence of the power. The remainder is vested, but is liable to be divested by an exercise of the power[8]. This is so notwithstanding that the power extends to an appointment in fee simple[9].

1 As to what words will create a contingent gift see WILLS vol 50 (2005 Reissue) PARA 707.

2 Fearne's Contingent Remainders 216; Challis's Law of Real Property (3rd Edn) 74; *Re Barbre's Settlement* (1916) 85 LJ Ch 683. See also *Parkhurst v Smith d Dormer* (1742) Willes 327 at 337. By 'present capacity' it must be understood that the capacity is already existing before the determination of the previous estate, and does not arise at the same instant as that determination. Thus, a remainder to an 'heir' of the tenant for life in such terms as to confer in him an estate by purchase is contingent, since the heir is not ascertained until the determination of the preceding life estate, although there is an heir presumptive always ready to be heir-at-law: see Challis's Law of Real Property (3rd Edn) 74-75. Such a limitation is still effective: see the Law of Property Act 1925 s 132(1).

3 See Fearne's Contingent Remainders 24; *De Grey v Richardson* (1747) 3 Atk 469.

4 Fearne's Contingent Remainders 223. This is important in case of waste by the tenant for life, since the owner of the first vested estate of inheritance is entitled to the proceeds of the waste: *Udal v Udal* (1648) Aleyn 81; *Bowles's Case* (1615) 11 Co Rep 79b. See further SETTLEMENTS.

5 *Loddington v Kime* (1697) 1 Salk 224; Fearne's Contingent Remainders 225, 229.

6 *Loddington v Kime* (1697) 1 Salk 224; *Doe d Davy v Burnsall* (1794) 6 Term Rep 30 at 35; *Burnsall v Davy* (1798) 1 Bos & P 215; *Doe d Planner v Scudamore* (1800) 2 Bos & P 289; *Doe d Gilman v Elvey* (1803) 4 East 313. See also Fearne's Contingent Remainders 373, and *Re White and Hindle* (1877) 7 ChD 201.

7 Law of Property Act 1925 s 1(3). Settlements created prior to 1 January 1997 take effect under the Settled Land Act 1925 (see s 1(1) (as amended); and SETTLEMENTS); on or after that date, and subject to certain exceptions, it has not been possible to create any new settlements under the Settled Land Act 1925 and interests will instead take effect behind a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1(1), 2(1); and PARAS 65-66 ante.

8 *Cunningham v Moody* (1748) 1 Ves Sen 174 at 177 per Lord Hardwicke LC; *Doe d Willis v Martin* (1790) 4 Term Rep 39 at 64; Fearne's Contingent Remainders 226 et seq. As to powers of appointment see generally POWERS.

9 See Fearne's Contingent Remainders 229 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(ii) Remainders/170. Contingent remainders.

170. Contingent remainders.

A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding estate[1]. Contingent remainders are divisible into four classes[2]: (1) where the remainder depends entirely on a contingent determination of the preceding estate itself[3]; (2) where the contingency is independent of the determination of the preceding estate[4]; (3) where the contingency is certain to happen, but may not happen until after the determination of the particular estate[5]; and (4) where the person to whom the limitation is made is not ascertained or is not in being[6].

Formerly wherever an estate of freehold was limited as a contingent remainder, some vested estate of freehold had to precede it, in other words, a contingent remainder had to have a vested particular freehold estate to support it[7]. However, there was no necessity for a preceding estate of freehold to support a contingent remainder for years[8].

It was necessary that the preceding freehold estate should continue until the time when the contingent remainder vested, for, if it determined earlier, the freehold went to the next vested remainderman, or, if there was none, to the reversioner, and, at common law, the contingent remainder could never arise. Consequently, it was a rule that, apart from statute, every remainder must vest either during the particular estate or else at the instant of its determination[9]. A posthumous child becoming entitled under a contingent remainder after his father's life estate was treated as being born in his father's lifetime so as to make the remainder vest in time[10].

1 Fearne's Contingent Remainders 3. The rules relating to the destructibility of contingent remainders are obsolete as regards limitations taking effect after 1925. Interests corresponding to contingent remainders may still be created as equitable interests (see the Law of Property Act 1925 s 4(1); and PARA 46 ante), but such equitable interests are not liable to destruction in the same way as were legal contingent remainders: see PARA 171 post. As to contingent remainders generally see 7 Holdsworth's History of English Law 81 et seq; Cheshire and Burn's Modern Law of Real Property (15th Edn, 1994) 277 et seq.

2 See Fearne's Contingent Remainders 5. Fearne's classification has been generally accepted, subject to the observations stated in notes 3-6 infra. However, the classification serves no practical purpose today.

3 This might occur eg in a limitation to A until a specified event which might or might not happen, and on the happening of the event to B in fee: *Boraston's Case* (1587) 3 Co Rep 19a at 20a. Under the former law A had by implication a life estate determinable on the happening of the event, and B's estate was contingent on the happening of the event during A's life. The peculiarity of this kind of contingent remainder is that it cannot become vested during the continuance of the particular estate, because the event which vests the remainder also determines the particular estate; but in the other classes (see notes 4-6 infra) the contingent remainder can vest during the continuance of the particular estate. Contingent remainders of this class are similar to executory limitations (see PARA 173 et seq post), but the distinction is that, in a contingent remainder, although the particular estate will determine on a contingency, yet this is part of its direct limitation. The next estate waits for its determination, and is a remainder, although, by reason of the contingent nature of this mode of determination, it is a contingent remainder. An executory limitation is, however, so framed as not to wait for the regular determination of the preceding estate. It interrupts and destroys that estate and substitutes another estate in its place: see *Egerton v Earl of Brownlow* (1853) 4 HL Cas 1 at 186.

4 Eg where the limitations are to A for life, remainder to B for life, and, if B dies before A, remainder to C for life: *Boraston's Case* (1587) 3 Co Rep 19a at 20a. The remainder to C is contingent on the death of B before A, and this is independent of the determination of A's estate: Fearne's Contingent Remainders 6-7. If B survives A, C's remainder can never take effect.

5 Eg where the limitations are to A for life, and after the death of B to C in fee: B's death is certain, but it may not happen until after the death of A, and hence C's remainder in fee is contingent. So, also, where the limitations are to A for 21 years if he shall so long live, and after his death to B in fee. The term may expire in the lifetime of A, but the remainder to B will not then be ready to come into possession. However, if the term is so long as to exceed A's probable life, the remainder is vested: see PARA 169 ante. The defect of these remainders was, not that the contingency might never happen, but that it might happen too late, that is, after a period uncovered by any preceding estate of freehold: Fearne's Contingent Remainders 7-8; Challis's Law of Real Property (3rd Edn) 128 et seq.

6 Eg where the limitations are to A for life, remainder to the right heirs of B, there can be no right heirs of B until his death, for *nemo est haeres viventis* (ie no one is the heir of a living man) (Co Litt 378a), and consequently, until that event, the remainder is contingent (*Challoners and Bowyer's Case* (1587) 2 Leon 70; *Boraston's Case* (1587) 3 Co Rep 19a at 20a; *Archer's Case* (1597) 1 Co Rep 66b). Such a limitation is still permissible as an equitable limitation (see the Law of Property Act 1925 s 132), or where a remainder is limited to the first son of B, who at that time has no son (Fearne's Contingent Remainders 9; Challis's Law of Real Property (3rd Edn) 132), or to several for life with remainder in fee to the heirs of the survivor. In the last instance there is a joint tenancy for lives with a contingent remainder in fee to the survivor: Co Litt 191a, Butler's note (1); *Quarm v Quarm* [1892] 1 QB 184, DC; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535. Cf *Re Legh's Settlement Trusts, Public Trustee v Legh* [1938] Ch 39, [1937] 3 All ER 823, CA. Limitations to unborn persons furnish in practice the most usual cases of contingent remainders.

Remainders which were prima facie limited to heirs of a living person, and were, therefore, contingent within this rule, might be excepted because the ancestor took a preceding estate of freehold, so that the words referring to his heirs were words of limitation under the rule (now abolished) in *Shelley's Case* (1581) 1 Co Rep 93b (see PARA 172 post) or because, on the construction of the instrument, the word 'heir' referred to a particular person (persona designata) existing at the date when the instrument took effect, and not to the person who would ultimately be the heir. In these cases the remainder vested, and would still vest, in the person so designated, notwithstanding the maxim quoted supra: Fearne's Contingent Remainders 209 et seq; Challis's Law of Real Property (3rd Edn) 132. See also *Burchett v Durdant* (1690) 2 Vent 311; *James v Richardson* (1678) 2 Lev 232; *Darbison v Beaumont* (1714) 1 P Wms 229, HL; *Goodright d Brooking v White* (1775) 2 Wm Bl 1010.

7 Fearne's Contingent Remainders 281 et seq. Consequently, under a limitation to A for years, remainder to the heirs of A in fee, the remainder, which was contingent during A's life, was void as a remainder for want of a preceding estate of freehold: *Goodright v Cornish* (1694) 1 Salk 226; *White v Summers* [1908] 2 Ch 256. It was held that the preceding estate of freehold necessary to support a contingent remainder must arise under the same instrument as that which created the contingent remainder: *Key v Gamble* (1678) T Jo 123; *Moore v Parker* (1695) 1 Ld Raym 37; Fearne's Contingent Remainders 302. However, this could not refer to the necessity of keeping the freehold full. That requirement was satisfied however the immediate estate of freehold was created, but the future interest, unless created by the same instrument, was not strictly a remainder on the particular estate. Thus it would not coalesce with it under the rule (now abolished) in *Shelley's Case* (1581) 1 Co Rep 93b (*Snowe v Cuttler* (1664) 1 Lev 135; *Moore v Parker* supra; *Doe v Fonnereau* (1780) 2 Doug KB 487 at 508; and see also PARA 172 post), and, not being a remainder, it could take effect as an executory interest, if created by devise or under the Statute of Uses (1535) (repealed): see Challis's Law of Real Property (3rd Edn) 120; and see further *Weale v Lower* (1672) Poll 54 at 66.

8 Fearne's Contingent Remainders 285.

9 Fearne's Contingent Remainders 307, 310.

10 As to wills see *Reev v Long* (1694) 1 Salk 227; extended to deeds by 10 Will 3 c 22 (Posthumous Children) (1698) (repealed). See also Co Litt 298a, Butler's note (3).

171. Contingent remainders no longer liable to destruction on determination of preceding particular estate.

Until the changes made by the Real Property Act 1845[1] and the Contingent Remainders Act 1877[2], contingent remainders in freeholds were liable to be destroyed, not only by their being still contingent at the time of the natural expiration of the preceding freehold estate in possession[3], but also by the premature determination of such estate[4], which might take place by forfeiture, surrender or merger, and in other ways now obsolete[5]. This liability to destruction did not exist where the contingent remainders were equitable, whether by reason of the legal estate in fee being vested in trustees by the settlement itself[6], or by reason of the legal estate being outstanding[7]. Since contingent remainders can now subsist only as equitable interests[8], their liability to destruction on this ground has ceased altogether. Consequently, the statutory provisions for their protection are obsolete and have been repealed[9]. They can be created as equitable interests as effectively as they could formerly have been created as legal interests, including their creation as legal interests under the Statute of Uses[10].

1 See the Real Property Act 1845 s 8 (repealed); and note 9 infra.

2 As to the Contingent Remainders Act 1877 (repealed) and the former statutory safeguards of contingent remainders see note 9 infra.

3 Eg where the limitations were to A for life, remainder to the heir of B, and A died before B (Co Litt 378a; *Doe d Mussell v Morgan* (1790) 3 Term Rep 763; cf *Fuller v Chamier* (1866) LR 2 Eq 682), or to A for life, remainder to the children of B, if he left children surviving him, and A died in the lifetime of B (*Price v Hall* (1868) LR 5 Eq 399), or to A for life, remainder to the first son of B who attained 21 in fee, and A died before a son of B had attained 21 (*White v Summers* [1908] 2 Ch 256). Where contingent remainders were limited in favour of a class the members of which became capable of taking at different times, the entirety vested in those who first became capable, and as others became capable during the existence of the particular estate, the remainder was divested to the extent necessary to let in the later members: *Matthews v Temple* (1699) Comb 467; *Oates d Hatterley v Jackson* (1742) 2 Stra 1172; *Doe d Comberbach v Perryn* (1789) 3 Term Rep 484. However, apart from statute, those who did not become capable during such continuance were excluded: *Festing v Allen* (1843) 12 M & W 279; *Rhodes v Whitehead* (1865) 2 Drew & Sm 532; *Brackenbury v Gibbons* (1876) 2 ChD 417; and see *Holmes v Prescott* (1864) 10 Jur NS 507. As to when such interests could be construed as executory see PARA 174 post.

4 *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a; *Archer's Case* (1597) 1 Co Rep 66b; *Egerton v Massey* (1857) 3 CBNS 338 (merger). In settlements this liability to destruction was avoided by the insertion of limitations to trustees to preserve contingent remainders: Fearne's Contingent Remainders 325 et seq; 2 Bl Com (14th Edn) 171; Challis's Law of Real Property (3rd Edn) 142 et seq.

5 Fearne's Contingent Remainders 316 et seq. As to these modes of determining an estate see PARA 253 et seq post. This liability of contingent remainders to destruction by failure of the preceding freehold estate in possession existed whether the limitation took effect at common law or under the Statute of Uses (1535) (repealed) (see PARA 20 ante): *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a; Fearne's Contingent Remainders 324.

6 The legal estate in the trustees prevented the freehold from being in abeyance, and the equitable contingent remainder required no preceding equitable estate to support it: Fearne's Contingent Remainders 304; *Berry v Berry* (1878) 7 ChD 657; *Abbiss v Burney, Re Finch* (1881) 17 ChD 211 at 229, CA; *Marshall v Gingell* (1882) 21 ChD 790; *Re Brooke, Brooke v Brooke* [1894] 1 Ch 43. However, where the limitations were, on the ordinary rules of construction, legal, the court did not depart from them in order to make the limitations equitable and so preserve the contingent remainders: *Cunliffe v Brancker* (1876) 3 ChD 393, CA. Equitable estates did not become liable to destruction by being clothed with the legal estate: *Re Freme, Freme v Logan* [1891] 3 Ch 167; *Re Robson, Douglass v Douglass* [1916] 1 Ch 116. As to whether limitations were legal or equitable see *Re Brooke, Brooke v Dickson* [1923] 2 Ch 265, CA.

7 Eg where the legal estate was outstanding in a mortgagee: *Astley v Micklethwait* (1880) 15 ChD 59; and see Fearne's Contingent Remainders 305 note (m), 321 note (e) (Butler's notes).

8 See the Law of Property Act 1925 s 1(1), (3); and PARAS 45-46 ante.

9 It was provided by the Real Property Act 1845 that a contingent remainder existing at any time after 31 December 1844 should be, and, if created before 4 August 1845, should be deemed to have been, capable of taking effect notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened: s 8 (repealed). To

ensure against the failure of contingent remainders by the natural expiration of the particular estate it was further provided by the Contingent Remainders Act 1877 that every contingent remainder created by any instrument executed after 2 August 1877, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use (as to which see PARA 179 et seq post) or executory devise or other limitation (as to which see PARA 173 et seq post), had it not had a sufficient estate to support it as a contingent remainder, should, in the event of the particular estate determining before the contingent remainder vested, be capable of taking effect as a springing or shifting use or executory devise or other executory limitation: see s 1 (repealed). Thus, contingent remainders arising under deeds or wills executed after 2 August 1877 were not liable to be defeated by the determination of the particular estate before they vested, and it was immaterial in what way the particular estate determined. However, so long as there was a possibility of the contingent remainders taking effect, vested remainders were not accelerated by the determination of the particular estate, and the intermediate income passed, under a will, by the residuary devise, or, if undisposed of, to the heir-at-law. Thus the Contingent Remainders Act 1877 (repealed) extended to determination by disclaimer: *Re Scott, Scott v Scott* [1911] 2 Ch 374.

10 See the Law of Property Act 1925 s 4(1); and PARA 46 ante. As to the Statute of Uses (1535) (repealed) see PARA 20 et seq ante.

172. Rule in Shelley's Case and its abolition.

Generally, the particular estate and the remainders limited after it were separate estates, and the person or persons defined by the limitations as the owners of each estate took it directly by virtue of the respective limitations. They were then said to take by purchase, as distinguished from taking by descent[1]. However, when the persons to take a remainder were described as the 'heirs' or 'heirs of the body' of a person who took a previous estate, this principle was departed from, and the words were construed as words of limitation. The remainder did not go directly to the heirs, but was treated as a continuation of the estate previously limited to the ancestor; and this was the case whether the remainder to the heirs immediately followed the ancestor's estate or not[2]. The rule is known as the rule in Shelley's Case[3], and is shortly expressed as follows: where, under a conveyance or devise[4], the ancestor takes an estate of freehold[5], and in the same instrument[6] an estate is limited by way of remainder[7], either mediately or immediately, to his heirs or to his heirs in tail[8], the word 'heirs' is a word of limitation and not of purchase, and the ancestor takes a fee simple or fee tail, as the case may be[9]. The rule applied not only to freehold estates at common law, but also to estates arising under the Statute of Uses[10], to equitable estates[11], to limitations of copyholds[12] and to estates pur autre vie[13].

It is now provided[14] that where by an instrument coming into operation after 1925 an interest in any property[15] is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which would formerly, under the rule in Shelley's Case[16], have operated to give that person an interest in fee simple or an entailed interest, those words are to operate in equity as words of purchase and not of limitation, and are to be construed and have effect accordingly[17]. Under the rule in Shelley's Case such words of inheritance took effect as words of limitation; consequently, the effect of this provision is to abolish that rule, and to confine the interest of the ancestor to the life estate which is expressly given to him.

1 See Littleton's Tenures s 12; and PARA 120 note 3 ante.

2 Thus, a limitation to A for life, remainder to his heirs, gave A an estate of inheritance in possession, either in fee simple or in fee tail according to the description of his heirs, and the estate in fee simple or in tail was said to be executed in him. Where there was a limitation to A for life, remainder to B for life, remainder to the heirs of A, A had two estates, his life estate in possession and his estate of inheritance in remainder: see Fearne's Contingent Remainders 33; *Coulson v Coulson* (1744) 2 Stra 1125 note (1); cf *Van Grutten v Foxwell,*

Foxwell v Van Grutten [1897] AC 658 at 677, HL, per Lord Macnaghten. If the interposed remainder was contingent, the estate of inheritance was executed sub modo (ie under condition or restriction); the life estate and the remainder coalesced for the time being, but they opened out and let in the contingent remainder as soon as it vested: see Fearne's Contingent Remainders 37; *Bowles's Case* (1615) 11 Co Rep 79b at 80a.

3 *Shelley's Case* (1581) 1 Co Rep 93b. For a statement of the case and the points decided in it see Challis's Law of Real Property (3rd Edn) 154 et seq; Tudor LC Real Prop (4th Edn) 332 et seq.

4 The estate taken by the ancestor need not be expressly limited; it might arise by implication, eg where the conveyance was by way of use and the use was undisposed of during the life of the settlor: *Pibus v Mitford* (1674) 1 Vent 372. See also PARAS 180 note 4, 181 note 4 post; and Fearne's Contingent Remainders 40.

5 Thus the rule did not apply where only a term of years was vested in the ancestor (*Harris v Barnes* (1768) 4 Burr 2157); nor to personal property (*Re McElligott, Grant v McElligott* [1944] Ch 216, [1944] 1 All ER 441), but an analogous rule was in some cases applied to leasehold property (see PARA 106 ante). The rule applied even though the estate limited to the ancestor might determine in his lifetime: *Curtis v Price* (1805) 12 Ves 89 at 99; Fearne's Contingent Remainders 30.

6 *Coape v Arnold, Arnold v Coape* (1855) 4 De GM & G 574; Fearne's Contingent Remainders 71. A will and codicil were the same instrument for this purpose (*Hayes d Foorde v Foorde* (1770) 2 Wm Bl 698), and so was an instrument creating a power of appointment and an appointment under the power (*Venables v Morris* (1797) 7 Term Rep 342 at 348; Fearne's Contingent Remainders 74).

7 The rule did not apply where the remainder arose under an executory limitation (Fearne's Contingent Remainders 276; *Coape v Arnold, Arnold v Coape* (1855) 4 De GM & G 574, doubted in *Re White and Hindle* (1877) 7 ChD 201 at 203), but it applied to contingent remainders, subject to the qualification that, so long as the remainder was contingent, the ancestor had the particular estate and the remainder as separate estates, and the contingent remainder did not coalesce with the particular estate until it vested (Fearne's Contingent Remainders 34).

8 The rule was not excluded where the limitation to heirs was to such as attained 21 (*Toller v Attwood* (1850) 15 QB 929); nor where the limitation to heirs had further words of limitation added to it (*Shelley's Case* (1581) 1 Co Rep 93b, where the limitation was to the heirs male of the body of the settlor and to the heirs male of the body of such heirs male); unless the course of descent under the additional words was inconsistent with that defined by the previous words (Fearne's Contingent Remainders 183; *Doe d Bosnall v Harvey* (1825) 4 B & C 610, where the limitation was to A for life, remainder to his heirs and the heirs male of their bodies; *Brookman v Smith* (1871) LR 6 Exch 291 at 305, Ex Ch, where the limitation was to A for life with an ultimate remainder to her heirs 'as if she had died sole and unmarried'; *Re Hall, Hall v Hall* [1893] WN 24, CA).

9 See *Shelley's Case* (1581) 1 Co Rep 93b at 104a, in the course of argument; *Perrin v Blake* (1770) 4 Burr 2579; *Jones v Morgan* (1783) 1 Bro CC 206 at 219; *Doe d Davy v Burnsall* (1794) 6 Term Rep 30 at 31; *Doe d Earl Lindsey v Colyear* (1809) 11 East 548 at 564; *Roe d Thong v Bedford* (1815) 4 M & S 362 at 365; *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658, HL; Fearne's Contingent Remainders 30; 1 Preston on Estates 263-265. As to the history and purpose of the rule see *Van Grutten v Foxwell, Foxwell v Van Grutten* supra at 668 per Lord Macnaghten.

10 Ie the Statute of Uses (1535) (repealed): see PARA 18 note 10 ante.

11 *Cooper v Kynock* (1872) 7 Ch App 398; *Re White and Hindle* (1877) 7 ChD 201; *Richardson v Harrison* (1885) 16 QBD 85 at 104, CA; *Re Youmans' Will* [1901] 1 Ch 720. Where the equitable limitations took effect by way of executed trust, the rule applied in the same manner as where the limitations were legal: *Jones v Morgan* (1783) 1 Bro CC 206 at 223. However, where the trust was executory, as in a will containing a direction to settle, the rule did not necessarily apply, and, in a conveyance made in pursuance of the trust, an estate for life, followed by estates tail, could be limited as in a strict settlement, if such appeared to have been the intention (*Lord Glenorchy v Bosville* (1733) Cas *temp* Talb 3; Fearne's Contingent Remainders 114 et seq). Trusts of marriage articles were executory for this purpose: *Streatfield v Streatfield* (1735) Cas *temp* Talb 176; Fearne's Contingent Remainders 90 et seq, 107. However, the rule only applied where the limitation to the ancestor and the limitation to his heirs were either both legal or both equitable: *Jones v Lord Say and Seal* (1728) 1 Eq Cas Abr 383(4); *Re Hobbs, Hobbs v Hobbs* [1917] 1 Ch 569 at 589, 596, CA; Fearne's Contingent Remainders 52, 58.

12 *Busby v Greenslate* (1721) 1 Stra 445; *Re Hack, Beadman v Beadman* [1925] Ch 633. See also Fearne's Contingent Remainders 60.

13 *Low v Burron* (1734) 3 P Wms 262; *Forster v Forster* (1742) 2 Atk 259. As to estates pur autre vie see PARA 151 et seq ante. The meaning of the limitations contained in the instrument had to be ascertained according to the ordinary canons of construction. Thus, in a deed, the limitation must be in words proper to give an estate tail (see PARA 120 ante), or in fee simple, as the case might be, and the word 'heirs', if used, must be in the plural: *Evans v Evans* [1892] 2 Ch 173, CA; *Re Davison's Settlement, Cattermole Davison v Munby* [1913] 2 Ch

498. However, where the limitations were contained in a will, the same strictness was not observed, and the word 'heir' attracted the rule (*Blackburn v Stables* (1814) 2 Ves & B 367; *Fuller v Chamier* (1866) LR 2 Eq 682; *Silcocks v Silcocks* [1916] 2 Ch 161; *Re Hack, Beadman v Beadman* [1925] Ch 633), provided it was not followed by words of limitation. These made it a word of purchase: *Archer's Case* (1597) 1 Co Rep 66b; *Willis v Hiscox* (1839) 4 My & Cr 197; *Greaves v Simpson* (1864) 33 LJ Ch 641; *Evans v Evans* [1892] 2 Ch 173, CA; *Re Hussey and Green's Contract* [1921] 1 Ch 566, where the word 'absolutely' following 'heir-at-law' had the same effect. Moreover, in a will, the words 'heir' or 'heirs', or 'in fee tail', were not essential. 'Any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word 'heirs'': *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658 at 668, HL, per Lord Macnaghten; *Re Hammond, Parry v Hammond* [1924] 2 Ch 276 at 279. The word 'son' or 'issue' might be construed as a word of limitation or a nomen collectivum (ie a collective name, being a designation covering persons of a particular class or indicating one of a particular class) in order to give effect to the limitations intended by the testator: *Mellish v Mellish* (1824) 2 B & C 520 (son); *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406 ('sons and their sons in succession'); *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 872 (issue); *Pelham-Clinton v Duke of Newcastle* [1902] 1 Ch 34, CA (affd [1903] AC 111, HL) (issue male and their male descendants). On the other hand, the context might show that the words 'heirs of the body' were not used as words of inheritance, but to denote sons or children as personae designatae (ie as individuals, as distinguished from members of a class), in which case the rule was excluded, and they took by purchase: *Goodtitle d Sweet v Herring* (1801) 1 East 264; *East v Twyford* (1851) 9 Hare 713 (affd (1853) 4 HL Cas 517); *Re Routledge, Marshall v Elliott* [1942] Ch 457, [1942] 2 All ER 418; *Re Williams, Tucker v Williams* [1952] Ch 828, sub nom *Re Williams' Will Trusts, Pitts-Tucker v Williams* [1952] 2 All ER 502. If the first words of a devise gave an estate tail when construed in accordance with the rule, this would not be cut down to an estate for life by subsequent words unless such subsequent words were equally clear: *Jack v Fetherston* (1835) 9 Bli NS 237, HL.

When the meaning of the limitations had been so ascertained, the rule in *Shelley's Case* (1581) 1 Co Rep 93b applied to them as a rule of law and not as a rule of construction (*Van Grutten v Foxwell, Foxwell v Van Grutten* supra at 662, 672), and was not excluded by indications of intention that the first estate should not extend beyond its primary limitation (*Jesson v Wright* (1820) 2 Bli 1, HL; *Roddy v Fitzgerald* (1858) 6 HL Cas 823; *Van Grutten v Foxwell, Foxwell v Van Grutten* supra at 672). Moreover, it was not excluded even by an express declaration that the ancestor should hold for life only (*Robinson v Robinson* (1758) 1 Burr 38, HL; *Re Baron Keane's Estate* [1903] 1 IR 215), or should not have power to bar the entail (*Leonard v Earl of Sussex* (1705) 2 Vern 526 at 527), or should not dispose of the estate for longer than his own life (*Perrin v Blake* (1770) 4 Burr 2579, 1 Wm Bl 672; as to the controversy aroused by this case see Fearne's Contingent Remainders 155 et seq), or that the heir should take by purchase (*Van Grutten v Foxwell, Foxwell v Van Grutten* supra at 663; 1 Hargrave's Law Tracts 562), or that the heirs should have only a life estate (*Doe d Cotton v Stenlake* (1810) 12 East 515; *Hugo v Williams* (1872) LR 14 Eq 224; *Re Mountgarret, Mountgarret v Ingilby* [1919] 2 Ch 294 at 300). However, the rule was excluded where the limitation was to the 'heir' and he was given a life estate: *White v Collins* (1718) Com 289; *Pedder v Hunt* (1887) 18 QBD 565, CA.

14 See the Law of Property Act 1925 s 131 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 3 para 4(1), (14)).

15 Since, after 1925, personal estate could be entailed (see the Law of Property Act 1925 s 130(1) (repealed)), the provision was made to apply to property generally; but see *Re McElligott, Grant v McElligott* [1944] Ch 216, [1944] 1 All ER 441.

16 Ie and but for the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5 (which prevents the creation on or after 1 January 1997 of any new entailed interests): see PARAS 105, 119 ante.

17 Law of Property Act 1925 s 131 (as amended: see note 14 supra). It is further provided by s 131 (as so amended), that the 'heir', or any particular heir, must be ascertained in accordance with the former general law, and the Inheritance Act 1833 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 638 et seq) is kept on foot for this purpose: see the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 1; and PARAS 118, 164 ante. The reference to the general law excludes inheritance according to a local custom such as gavelkind (as to which see PARA 14 ante): *Re Higham, Higham v Higham* [1937] 2 All ER 17.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iii) Executory Interests/173. How executory limitations are created.

(iii) Executory Interests

173. How executory limitations are created.

At common law, future interests could only be created inter vivos as remainders or reversions, and they had to comply with the rules applicable to remainders[1]. Future interests, known as 'executory interests', which did not comply with the common law rules, could be created by limitations operating under the Statute of Uses[2], and by devise. When created under the Statute of Uses they were either springing or shifting uses, and they could only be created in freeholds[3]. Executory interests under wills could exist either in freeholds or in chattels real, and were similarly springing or shifting devises.

Executory devises in the form of springing devises and shifting devises are still permitted, but they can only be equitable interests[4]. On the death of the testator, if he was seised in fee absolutely, the legal estate will devolve in the first instance on his personal representatives[5], who will hold it on the trusts of the will and under these trusts the executory devise will subsist as an equitable interest[6]. Subject to this change in their nature, the former law[7] still applies to executory interests.

1 As to these rules see PARA 168 et seq ante.

2 Ie the Statute of Uses (1535) (repealed, although equitable interests of a corresponding nature may still be created: see PARA 182 post).

3 They could only be created in freeholds because the Statute of Uses (1535) (repealed) only applied to freeholds: see PARA 21 ante. As to springing and shifting uses see PARA 179 et seq post.

4 See the Law of Property Act 1925 s 4(1); and PARA 46 ante.

5 See the Administration of Estates Act 1925 ss 1, 2 (as amended); and EXECUTORS AND ADMINISTRATORS.

6 The trust is known as a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1(1); and PARA 66 ante. In the case of a testator dying after 1925, but prior to 1 January 1997, a settlement under the Settled Land Act 1925 would have been created; the legal estate devolved in the first instance on his personal representatives, who then by a vesting assent vested it in the tenant for life or person having the powers of a tenant for life, whereupon he held it on the trusts of the will and under these trusts the executory devise subsisted as an equitable interest: see the Settled Land Act 1925 ss 6, 8(1), (4)(b), 19, 20 (as originally enacted); and SETTLEMENTS.

7 As to the former law see generally paras 174-175 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iii) Executory Interests/174. Nature of executory limitations.

174. Nature of executory limitations.

While, both under the Statute of Uses[1] and by will, future interests could be created which did not comply with the rules applicable to remainders, they were distinct from remainders, and it was a fundamental rule that a limitation which in its inception could operate as a remainder should not be allowed to operate as an executory limitation[2]. Consequently, an executory limitation was a limitation of a future estate in land which did not comply with the rules for limitations at common law, and could not in its inception take effect as a remainder, but which, nevertheless, was contained, as regards freeholds, in a conveyance operating under the Statute of Uses, and, as regards freeholds and chattels real, in a will[3]. Executory devises, notwithstanding their freedom from common law rules, created, in effect, common law estates[4]; and although they can no longer take effect at law, corresponding estates or interests may be created in equity and will take effect as equitable interests[5].

The rule that a limitation in a will which could operate as a remainder should not, apart from statute, operate as an executory devise made it necessary to distinguish between a contingent

remainder and an executory devise[6]. A remainder was limited to wait for and take effect upon the natural limitation of a preceding estate of freehold[7]. If a future interest did not wait for such determination, or if, in its inception, it could not take effect at the determination of the preceding estate, it was an executory devise[8]. In order that a future interest might be a remainder, it was sufficient that it could, in its inception, that is, according to the nature of its original limitation, take effect before, or instantly with, the determination of the particular estate; the improbability that it would actually so take effect did not change it from a remainder to an executory interest[9].

1 As to the Statute of Uses (1535) and its repeal see PARA 20 et seq ante.

2 *Purefoy v Rogers* (1671) 2 Wms Saund 380 at 388; *Goodright v Cornish* (1694) 4 Mod Rep 255 at 259; *Carwardine v Carwardine* (1758) 1 Eden 27 at 34; *Doe d Mussell v Morgan* (1790) 3 Term Rep 763; *Brackenbury v Gibbons* (1876) 2 ChD 417 at 419; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95 at 104, CA; *White v Summers* [1908] 2 Ch 256 at 263.

3 Fearne's Contingent Remainders 386; cf Challis's Law of Real Property (3rd Edn) 172. Whenever one limitation in a devise was executory, all subsequent limitations had also to be executory: see Fearne's Contingent Remainders 503; *Reev v Long* (1694) Carth 309. As to an executory devise being changed into a remainder by an event happening after the testator's death see *Hopkins v Hopkins* (1738) 1 Atk 581 at 589; *Doe d Harris v Howell* (1829) 10 B & C 191. A remainder which failed as such during the testator's lifetime could take effect as an executory devise. Where, eg, a devisee for life died in the testator's lifetime, and this left, at the testator's death, interests limited as contingent remainders, none of which were vested, they became executory interests: *Hopkins v Hopkins* (1738) Cas *temp* Talb 44; *Doe d Scott v Roach* (1816) 5 M & S 482 at 492; Fearne's Contingent Remainders 525. In such cases, the court leaned in favour of an executory devise in order to give effect to the testator's intention, but a remainder could not, at common law, be changed to an executory devise after the testator's death: 2 Preston's Abstracts of Title 172; *Mogg v Mogg* (1815) 1 Mer 654 at 704. If this had been possible, contingent remainders could always have been saved from destruction by treating them as executory devises, and this in fact is the mode in which they were by statute saved from destruction: see PARA 171 ante.

4 See Williams on the Law of Real Property (24th Edn) 475.

5 See the Law of Property Act 1925 s 4(1); and PARA 46 ante.

6 The importance of the difference between contingent remainders and executory interests lay not only in the liability of contingent remainders to destruction by failure of the particular estate (see PARA 171 ante), but also in the fact that contingent remainders could be barred by fine or recovery (as to which see PARA 121 ante). Executory devises could not be barred by recovery (Fearne's Contingent Remainders 418) since they did not depend on the estate of the person who suffered the recovery (*Pells v Brown* (1620) Cro Jac 590). See also Fearne's Contingent Remainders 424; Challis's Law of Real Property (3rd Edn) 177.

7 As to the former rules for the creation of remainders see PARA 168 ante.

8 As to springing devises see PARA 175 post.

9 Fearne's Contingent Remainders 395.

175. Springing and shifting devises.

A future interest took effect as a springing devise when it was so limited by the will that it had no preceding estate of freehold to support it[1], or where there was a preceding estate limited, but there was necessarily a gap between the determination of the preceding estate and the vesting in possession of the future estate[2]. The future interest might arise either at a time certain or on a contingency[3]. The want of an immediately preceding freehold estate prevented the future interest from taking effect as a remainder, and accordingly it was valid as an

executory devise[4], provided that it did not infringe the rule against perpetuities[5]. Until the devise took effect in possession, the land devolved on the heir-at-law[6], or, under the Land Transfer Act 1897[7], on the personal representative, and thus the freehold was not in abeyance[8].

A future interest took effect as a shifting devise when it was so limited by the will that it did not wait for the natural determination of the preceding estate, but vested in possession upon an event which determined that estate otherwise than in accordance with its direct limitation. Thus, estates limited upon the natural determination of a life estate were remainders; but if there was a clause of forfeiture of the life estate, and the next interests were in that event accelerated, they took effect, on the event happening, as executory interests[9].

Similarly, where an estate in fee simple absolute had been limited, the land might be devised in a different direction on a contingent event, and the happening of the event shifted the fee accordingly[10], although at common law a fee could not be limited after a fee[11]; and an interest limited to take effect after a determinable fee, since it could not be a remainder[12], was an executory interest[13].

1 Fearne's Contingent Remainders 395. Examples are a devise to A in fee to take effect at the expiration of six months from the testator's death (*Pay's Case* (1602) Cro Eliz 878; *Clarke v Smith* (1700) 1 Lut 793 at 798); or to the first son of A and A has no son at the testator's death (*Gore v Gore* (1722) 2 P Wms 28; *Bullock v Stones* (1754) 2 Ves Sen 521); or to a specified son of the testator when he shall attain 21, and he is under 21 at the testator's death (*Doe d Andrew v Hutton* (1804) 3 Bos & P 643).

2 Eg a devise to A for life, and after his death and one day, to the eldest son of B: 1 Plowd 25b. See also *White v Summers* [1908] 2 Ch 256; Fearne's Contingent Remainders 398, 401; cf *Abbiss v Burney, Re Finch* (1881) 17 ChD 211, CA.

3 Fearne's Contingent Remainders 400.

4 This might happen in the case of a springing devise to a class. Thus, where after an estate for life the property was devised to such of the children of the tenant for life as attained 21 either before or after the death of the tenant for life, the express inclusion of children attaining 21 after such death showed that a gap between the life estate and the future interests was contemplated. Thus, since the future interests could not, as to children attaining 21 after the death, take effect as remainders, they were all executory devises (*Re Lechmere and Lloyd* (1881) 18 ChD 524; *Re Bourne, Rymer v Harpley* (1887) 56 LJ Ch 566; *Dean v Dean* [1891] 3 Ch 150; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95 at 104, CA); and so, too, where the future devise was to children of a third person who were born before or after the death of the tenant for life (*Miles v Jarvis* (1883) 24 ChD 633).

5 As to the rule against perpetuities see generally PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq.

6 *Pay's Case* (1602) Cro Eliz 878; *Clarke v Smith* (1700) 1 Lut 793 at 798; *Gore v Gore* (1722) 2 P Wms 28 at 47.

7 The Land Transfer Act 1897 was repealed as respects deaths after 1925 by the Law of Property (Amendment) Act 1924 s 1, Sch 1 (repealed). See EXECUTORS AND ADMINISTRATORS.

8 *Harris v Barnes* (1768) 4 Burr 2157. See also Challis's Law of Real Property (3rd Edn) 169-172; and PARA 168 ante. Since an executory devise can now operate only in equity, the question of the freehold being in abeyance does not arise.

9 *Blackman v Fysh* [1892] 3 Ch 209, CA; *Re Leach, Leach v Leach* [1912] 2 Ch 422. An estate in trustees to preserve contingent remainders did not necessarily prevent the ulterior limitation, if vested, from taking effect in possession on the premature determination of the life estate: see *Carr v Earl of Erroll* (1805) 6 East 59; cf *Doe d Heneage v Heneage* (1790) 4 Term Rep 13; *Stanley v Stanley* (1809) 16 Ves 491 at 509. As to estates taken under a shifting clause see *Carr v Earl of Erroll* supra; *Re Harcourt, Fitzwilliam v Portman* [1920] 1 Ch 492.

10 *Pells v Brown* (1620) Cro Jac 590 (devise by a testator to C, his son and his heirs, and if C died without issue during D's lifetime, then to D and his heirs; C had a vested fee simple, subject to a shifting devise in favour of D on C's dying without issue in D's lifetime).

11 *Pells v Brown* (1620) Cro Jac 590. See also PARAS 115, 163 ante.

12 As to the nature of a remainder see PARA 168 ante, in particular note 9.

13 Challis's Law of Real Property (3rd Edn) 81 et seq. See also note 4 supra; and PARA 173 et seq ante. An estate pur autre vie might be the subject of an executory devise: *Re Barber's Settled Estates* (1881) 18 ChD 624; *Re Michell, Moore v Moore* [1892] 2 Ch 87. As to such estates see PARA 151 et seq ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iii) Executory Interests/176. Estates tail.

176. Estates tail.

An executory devise which puts an end to an estate tail and shifts the property to another person operates in defeasance of the estate tail and is barred by a disentailing deed[1].

1 *Doe d Lumley v Earl of Scarborough* (1835) 3 Ad & El 2 (revsd sub nom *Earl of Scarborough v Doe d Savile* (1836) 3 Ad & El 897, Ex Ch); *Milbank v Vane* [1893] 3 Ch 79, CA. See also *Miles v Harford* (1879) 12 ChD 691; *Pinkerton v Pratt* [1915] 1 IR 406 at 410-411; and PARA 130 ante. As to clauses shifting an estate from the eldest son for the time being, and as to the construction of shifting clauses generally, see *Shuttleworth v Murray* [1901] 1 Ch 819, CA (affd sub nom *Law Union and Crown Insurance Co v Hill* [1902] AC 263, HL); cf *Collingwood v Stanhope* (1869) LR 4 HL 43. As to shifting clauses on the owner becoming entitled to another estate see *Monypenny v Dering* (1852) 2 De GM & G 145; *Lady Langdale v Briggs* (1856) 8 De GM & G 391; and SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iii) Executory Interests/177. Effect of shifting devise.

177. Effect of shifting devise.

A shifting devise may, as in the case where it effectually disposes of the fee, defeat the prior estate altogether, but this is not necessary, and the prior estate is only interrupted to the extent required to give effect to the executory limitation. Thus, if the executory limitation confers a life interest, the life interest takes effect by way of exception out of the prior estate[1]; and, if there is no person who can take the benefit of the executory limitation, the prior estate continues uninterrupted[2]. However, if the form of the executory devise definitely puts an end to the prior estate, the prior estate will be defeated notwithstanding that the executory devise fails to take effect[3], unless it is plain that the testator intended it to be defeated only if the executory devise took effect[4].

Moreover, the executory limitation only takes effect on the happening of the prescribed event; this determines the prior estate and substitutes the executory devise. The failure of the prior estate in some other manner does not let in the executory devise; the land goes instead as on an intestacy or to the residuary devisee[5].

1 *Gatenby v Morgan* (1876) 1 QBD 685; *Re Jones, Last v Dobson* [1915] 1 Ch 246 at 254.

2 *Jackson v Noble* (1838) 2 Keen 590.

3 *Doe d Blomfield v Eyre* (1848) 5 CB 713, Ex Ch. See also WILLS vol 50 (2005 Reissue) PARA 473.

4 *Re Rooke, Taylor v Rooke* [1953] Ch 716, [1953] 2 All ER 110; see WILLS vol 50 (2005 Reissue) PARA 473.

5 Eg a devise to A in fee, but if A dies under 21, then to B in fee. Here B takes in the event of A dying under 21, but not in the event of A attaining 21 and dying in the lifetime of the testator. The death causes a lapse, and there is consequently a failure of the prior estate; but the form of the executory devise does not allow B to take:

Tarbuck v Tarbuck (1835) 4 LJ Ch 129; *Brookman v Smith* (1872) LR 7 Exch 271. However, the strict rule of construction is not followed in the case of a determinable life interest, and the gift over may take effect on death, although in terms only given in the event of determination during the life: *Re Seaton, Ellis v Seaton* [1913] 2 Ch 614. As to the construction of executory devises see *O'Mahoney v Burdett* (1874) LR 7 HL 388; and WILLS vol 50 (2005 Reissue) PARA 735 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iii) Executory Interests/178. Statutory defeasance of executory limitation.

178. Statutory defeasance of executory limitation.

A restriction is placed by the Law of Property Act 1925 on the creation of executory interests to take effect on failure of issue. Where, under an instrument coming into operation after 31 December 1882, there is a person entitled to an equitable interest in land for an estate in fee simple or for any less interest not being an entailed interest, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, the executory limitation becomes void as soon as any issue of the class in question has attained the age of 18 years[1].

1 See the Law of Property Act 1925 s 134(1) (reproducing the Conveyancing Act 1882 s 10(1) (repealed); amended by the Family Law Reform Act 1969 ss 1(3), 28(3), Sch 1 Pt I (which reduced the age of majority from 21 to 18)). As to this provision for avoiding executory limitations see Challis's Law of Real Property (3rd Edn) 178. Moreover, this provision extends to any interest in personal property not being an entailed interest: Law of Property Act 1925 s 134(1)(b). If there is a gift over in case the first devisee dies 'without child or children', this means without leaving a child or children, and, on the birth of a child, the devisee holds subject to an executory gift over in the event of his not having any child who survives him or attains the age of 18 in his lifetime: *Re Booth, Pickard v Booth* [1900] 1 Ch 768. The Conveyancing Act 1882 s 10 (repealed) applied only where a person was entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, and as regards instruments coming into operation before 1 January 1926, the Law of Property Act 1925 s 134 (as so amended) is limited accordingly: see s 134(2).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iv) Springing and Shifting Uses/179. Uses by way of remainder or executory interests.

(iv) Springing and Shifting Uses

179. Uses by way of remainder or executory interests.

Uses created under the Statute of Uses[1] might be limited to take effect in the future, and this might be either by way of remainder, in which case the future use was subject to the rules relating to the creation of remainders at common law[2], or by way of executory interest, in which case the limitation took effect without regard to such rules[3].

1 As to the Statute of Uses (1535) and its repeal see PARA 20 et seq ante.

2 As to the former rules for the creation of remainders see PARA 168 ante.

3 1 Sanders on Uses and Trusts (5th Edn) 141 et seq. The use was as 'clay in the hands of the potter' (see *Beckwith's Case* (1589) 2 Co Rep 56b at 57b), and the settlor or grantor could mould it as he would, save that if it was limited by way of remainder it could not take effect as an executory interest: Gilbert's Law of Uses and Trusts (3rd Edn) 4. See also PARA 174 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iv) Springing and Shifting Uses/180. Application of common law rules to uses by way of particular estates and remainders.

180. Application of common law rules to uses by way of particular estates and remainders.

Where a conveyance made under the Statute of Uses[1] disposed, either expressly or by implication, of the uses of the entire fee by way of particular estate and remainder or reversion, each estate, so far as it was effectual, was a legal estate, and was subject to the rules applicable to common law estates. Consequently the uses themselves had to supply the estates necessary to prevent the freehold from being in abeyance, no seisin for this purpose remaining in the grantees to uses[2]. The particular freehold estate might arise either by express limitation of the use for an estate of freehold[3], or by a resulting use to the settlor for his life[4]; but, if the first limitation of the use was to the settlor for a term of years, followed by a contingent use by way of remainder, no life estate resulted to the settlor, since this would be inconsistent with the express limitation, and the contingent uses, apart from statute[5], failed[6].

1 As to the Statute of Uses (1535) and its repeal see PARA 20 et seq ante.

2 Before the Statute of Uses (1535) (repealed), the legal estate in the feoffees to uses would have supported contingent uses (see generally para 171 ante), but the Statute of Uses, by transferring the seisin to the cestuis que use, left nothing in the feoffees which could have this effect: *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a at 135a per Gawdy J; *Buckley v Simonds* (1620) Win 59 at 60; Gilbert's Law of Uses and Trusts (3rd Edn) 165n. See also PARAS 168, 179 ante.

3 Eg a grant to the use of A for life, remainder to the use of the right heirs of B. This was a contingent remainder (see PARA 170 ante), and would, apart from the Contingent Remainders Act 1877 (repealed) (see PARA 171 ante), have failed in the event of the death of A before B: see 1 Sanders on Uses and Trusts (5th Edn) 141 et seq; and see further PARA 170 note 6 ante.

4 *Pibus v Mitford* (1674) 1 Vent 372 (covenant by A seised in fee to stand seised to the use of his heirs male by his second wife; here there was a resulting trust to A for life, remainder to the special heirs of A, and these limitations gave A an immediate estate tail special under the rule in *Shelley's Case* (1581) 1 Co Rep 93b (see PARA 172 ante)). See further Fearne's Contingent Remainders 41, 42; 1 Sanders on Uses and Trusts (5th Edn) 144.

5 As to the former statutory safeguards of contingent remainders see PARA 171 ante. As to the former liability of contingent uses to destruction see *Chudleigh's Case* (1595) 1 Co Rep 113b, 120a; 1 Sanders on Uses and Trusts (5th Edn) 241.

6 *Adams v Savage (Terre-tenants)* (1703) 2 Salk 679 (to use of the settlor for 99 years, remainder to use of trustees for 25 years, remainder to heirs male of the body of settlor, remainder to his right heirs; the express limitation of the term excluded a resulting use to the settlor for life, and the remainder to the heirs male of the body of the settlor failed for want of an estate of freehold to support it). See also *Rawley v Holland* (1712) 2 Eq Cas Abr 753; 22 Vin Abr, Uses (F) pl 11; Gilbert's Law of Uses and Trusts (3rd Edn) 35, 118 note (3); and PARA 170 note 6 ante. However, it seems that in these cases, since the freehold could not be in abeyance, the fee resulted to the settlor and destroyed the term: Fearne's Contingent Remainders (10th Edn) 42, Butler's note. However, they were the subject of much criticism: see eg 1 Sanders on Uses and Trusts (5th Edn) 147; and 1 LQR 412.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iv) Springing and Shifting Uses/181. Freedom of springing and shifting uses from common law rules.

181. Freedom of springing and shifting uses from common law rules.

When a use, not limited by way of remainder, did not defeat a previous estate expressly limited by the same conveyance, it was called a 'springing use'; when it defeated such a previous estate, it was called a 'shifting use'[1].

A springing use was effectual notwithstanding that, if the estate were created by a common law limitation, it would be void for putting the freehold into abeyance[2], either because the use was the first use limited and was to arise at a future time[3], or because it was to arise at an interval after the determination of a previous estate[4]. A shifting use was effectual notwithstanding that it did not, in accordance with the common law rule, wait for the regular determination of the previous estate[5], and, in breach of the common law, it might be limited so as to defeat a fee simple or to take effect after a determinable fee[6]. It might be created either by words of limitation or of condition[7].

1 Challis's Law of Real Property (3rd Edn) 76, 174. If the use was limited by way of remainder, it must take effect as such (Gilbert's Law of Uses and Trusts (3rd Edn) 172), and be supported by a preceding estate of freehold (see PARA 170 ante). As to springing uses see Gilbert's Law of Uses and Trusts (3rd Edn) 161 et seq; as to shifting uses see Gilbert's Law of Uses and Trusts (3rd Edn) 153 et seq, 286n; and as to springing and shifting devises see PARA 175 ante.

2 As to the rule that the freehold must never be in abeyance see PARA 168 ante. The doctrine of resulting uses enabled the future use to be created without putting the freehold into abeyance; consequently, springing uses, although apparently limited in breach of the rule, were really consistent with it. The use resulted to the settlor until the event which gave effect to the springing use, and the freehold consequently was full: see 1 LQR 412.

3 Eg where the conveyance was by A to grantees to the use of B to commence four years afterwards, or to the use of B after the death of C without issue if such event occurred within 20 years: *Clere's Case* (1600) 6 Co Rep 17b; *Davis v Speed* (1692) 2 Salk 675 (affd (1698) Show Parl Cas 104, HL). As to the common law rule cf para 168 ante. It was essential that the grantees to uses should take an immediate seisin. A grant by A to the grantees from a future date to the use of B and his heirs was the grant of a freehold to commence in the future, and was void: *Lamb v Archer* (1692) 1 Salk 225; *Roe d Wilkinson v Tranmarr* (1758) Willes 682; *Goodtitle d Dodwell v Gibbs* (1826) 5 B & C 709; 1 Sanders on Uses and Trusts (5th Edn) 143. The springing use might arise where the seisin remained in the assurer, as in a bargain and sale, or a covenant to stand seised: *Roe d Wilkinson v Tranmarr* supra; *Doe d Dyke v Whittingham* (1811) 4 Taunt 20; *Doe d Starling v Prince* (1851) 15 Jur 632. As to such assurances see PARA 23 ante.

4 Eg where the grant was to the use of B for life, and after a year from his death to the use of C in fee simple. As to the common law rule cf para 168 ante. The principle of resulting uses was that in a conveyance to uses without valuable consideration, so much of the use as was undisposed of remained in the grantor: Co Litt 23a. See also PARA 180 note 4 ante; *Weale v Lower* (1672) Poll 54 at 64; *Pibus v Mitford* (1674) 1 Vent 372; *Davis v Speed* (1692) 2 Salk 675; Bacon's Reading upon the Statute of Uses 63; 1 Sanders on Uses and Trusts (5th Edn) 109, 142-143; Gilbert's Law of Uses and Trusts (3rd Edn) 162n; Fearne's Contingent Remainders 48.

5 As to the rule that a shifting use must wait for the regular determination of the previous estate see PARA 168 ante. Thus, a grant to the use of A for life, and if B before a specified date should pay £100 to the grantor, then to the use of B for life, created a good shifting use: *Brent's Case* (1583) 2 Leon 14 at 16; 1 Sanders on Uses and Trusts (5th Edn) 155.

6 1 Sanders on Uses and Trusts (5th Edn) 149; Gilbert's Law of Uses and Trusts (3rd Edn) 147. Cf para 168 note 9 ante. Thus, in the example given in note 5 supra, the uses might both be in fee simple: Bro Abr, Feoffements al Uses, pl 30; 1 Sanders on Uses and Trusts (5th Edn) 150. The second fee was not limited upon, but in derogation of, the first. Where the first fee was a determinable fee, as in the first limitation in a strict settlement made on marriage, the next limitation was executory; it could not take effect as a remainder, since it was subsequent to a fee: Challis's Law of Real Property (3rd Edn) 175.

7 1 Sanders on Uses and Trusts (5th Edn) 158. A precedent tenant in fee simple could not bar a shifting use, but a tenant in tail could: see 1 Sanders on Uses and Trusts (5th Edn) 158; and PARA 130 ante. As to shifting uses under name and arms clauses see 1 Sanders on Uses and Trusts (5th Edn) 132, 207; and SETTLEMENTS; and as to the necessity of confining executory uses within the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1027.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(iv) Springing and Shifting Uses/182. Effect of repeal of the Statute of Uses.

182. Effect of repeal of the Statute of Uses.

With the repeal of the Statute of Uses[1], the creation of estates and interests by way of use has ceased, and consequently springing and shifting uses cannot arise under any instrument coming into operation after 1925, but interests in land which under the Statute of Uses could have been created as legal interests may be created as equitable interests[2]. Thus the objects of executory uses may now be attained by creating the like interests by way of trust[3].

1 As to the Statute of Uses (1535) and its repeal see PARA 20 et seq ante.

2 See the Law of Property Act 1925 s 4(1); and PARA 46 ante.

3 The trust will be a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 2; and PARAS 65-66 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(4) FUTURE INTERESTS/(v) Spes Successionis/183. In general.

(v) Spes Successionis

183. In general.

No one could have any estate or interest, at law or in equity, in the property of a living person by reason of the fact that he hoped to succeed as heir-at-law or next of kin; and it was the same where there was a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person; or where the limitation was not to the actual heir or next of kin at the death, but to the persons who would be heir or next of kin if the ancestor were to die at some future time[1]. Such mere expectation, known as a 'spes successionis', conferred no actual interest in the property, not even a contingent interest[2], or an interest in expectancy[3], since no one is the heir of a living person; and, as long as the ancestor was alive there was no person in whom the right to take by descent resided. The position is the same now as regards persons who may hope to benefit under the statutory provisions now in force for the distribution of the estate of an intestate[4]. Consequently, spes successionis is not a title to property[5]; nor does it confer a right to sue for the preservation of the property[6].

1 *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51. In *Re Midleton's Will Trusts, Whitehead v Earl of Midleton* [1969] 1 Ch 600, [1967] 2 All ER 834, it was held, not following *Re St Albans' Will Trust* [1963] Ch 365, [1962] 2 All ER 402, that the same applied to a gift to the person who, on the death of a living person, should succeed to his title.

2 See Watkins on Conveyancing (8th Edn) 219n, referred to in *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 at 57; *Allcard v Walker* [1896] 2 Ch 369 at 380. It confers no interest at all, either vested or contingent, but only an expectation of an interest: *Clowes v Hilliard* (1876) 4 ChD 413 at 416. As to the effect of an assignment of a spes successionis see PARA 231 post; and CHOSES IN ACTION vol 13 (2009) PARA 30.

3 *Re Green, Green v Meinall* [1911] 2 Ch 275.

4 As to intestate succession generally see EXECUTORS AND ADMINISTRATORS.

5 *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 at 56. Thus a wife's jus relictae under Scots law is, during her husband's life, a mere spes successionis, and is not 'an estate or interest' in property coming to her 'during the coverture' within the meaning of the usual covenant for settlement of after-acquired property: *Re Simpson, Simpson v Simpson* [1904] 1 Ch 1, CA.

6 See *Davis v Angel* (1862) 4 De GF & J 524 at 529; *Clowes v Hilliard* (1876) 4 ChD 413.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(5) ENFORCEMENT OF EQUITABLE INTERESTS/184. Estate owner and beneficiary.

(5) ENFORCEMENT OF EQUITABLE INTERESTS

184. Estate owner and beneficiary.

The relationship of the estate owner to the owner of an equitable interest is that of a trustee to a beneficiary, and the rights of the beneficiary are enforceable against the estate owner in a court exercising equitable jurisdiction[1]. The Law of Property Act 1925 expressly based the law of property on the distinction between legal and equitable interests[2], and accordingly provided for the enforcement of the equitable interests. Provision is thus made for two classes of case: (1) where the land is settled land[3]; (2) in any other case[4].

1 See *Hardoon v Belilios* [1901] AC 118 at 123, PC; and EQUITY vol 16(2) (Reissue) PARA 602.

2 See the Law of Property Act 1925 s 1(2), (3) (as amended); and PARA 45 et seq ante.

3 See ibid s 3(1)(a); and PARA 185 post.

4 See ibid s 3(1)(c) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (3)).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(5) ENFORCEMENT OF EQUITABLE INTERESTS/185. Settled land.

185. Settled land.

In the case of settled land the tenant for life or statutory owner is bound to give effect to the equitable interests and powers in or over the land in the manner provided by the Settled Land Act 1925[1]. The powers and duties of the tenant for life or statutory owner, and the rights of the beneficiaries under the settlement and of other persons with an equitable interest in the land, are considered elsewhere in this work[2].

1 See the Law of Property Act 1925 s 3(1)(a); the Settled Land Act 1925 s 16; and SETTLEMENTS.

2 See SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(5) ENFORCEMENT OF EQUITABLE INTERESTS/186. Any other case.

186. Any other case.

In any other case other than a case of settled land[1], the estate owner is bound to give effect to the equitable interests and powers affecting his estate of which he has notice, according to their respective priorities[2].

1 Ie any case not falling within the Law of Property Act 1925 s 3(1)(a): see PARA 185 ante.

2 Ibid s 3(1)(c) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (3)). The generality of 'estate owner' seems to have suggested that this provision might prejudice a mortgagee or personal representatives in the exercise of their powers. Consequently the Law of Property Act 1925 s 3(1)(c) (as so amended) adds that it does not affect the priority or powers of a legal mortgagee or the powers of personal representatives for purposes of administration.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(5) ENFORCEMENT OF EQUITABLE INTERESTS/187. Right of reverter or right of entry.

187. Right of reverter or right of entry.

Where, by reason of an equitable right of entry[1] taking effect, or for any other reason, a person becomes entitled to require a legal estate to be vested in him, then and in any such case the estate owner whose estate is affected is bound to convey or create such legal estate as the case may require[2].

1 As to estates in fee subject to a right of entry see PARA 97 ante.

2 Law of Property Act 1925 s 3(3) (amended by the Reverter of Sites Act 1987 s 8(2), (3), Schedule). A right of pre-emption given by the will of a testator was not enforceable under this provision against the trustees of the will where the trustees were by virtue of the Law of Property Act 1925 holding on the trusts imposed by s 35 (repealed): *Re Flint, Flint v Flint* [1927] 1 Ch 570.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/4. EQUITABLE INTERESTS/(5) ENFORCEMENT OF EQUITABLE INTERESTS/188. Powers of the court.

188. Powers of the court.

If any question arises whether any and what legal estate ought to be transferred or created, any person interested may apply to the court[1] for directions[2].

If the estate owners refuse or neglect for one month after demand to transfer or create any such legal estate, or if by reason of their being out of the United Kingdom or being unable to be found, or by reason of the dissolution of a corporation[3] or for any other reason, the court[4] is satisfied that the transaction cannot otherwise be effected, or cannot be effected without undue delay or expense, the court may, on the application[5] of any person interested, make a vesting order transferring or creating a legal estate[6].

1 Ie the High Court or, where it has jurisdiction, the county court: Law of Property Act 1925 s 203(3) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). The county court has jurisdiction under the Law of Property Act 1925 s 3(4), (5) (as amended), where the land which is to be dealt with in the court does not

exceed in capital value £30,000: s 3(7) (added by the County Courts Act 1984 s 148(1), Sch 2 paras 2(1), (3); amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule).

2 Law of Property Act 1925 s 3(4). Application is made by summons at chambers in the Chancery Division: see s 203(2)(a), (4).

3 For the effect of the dissolution of a corporation see PARA 91 note 6 ante; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1301 et seq.

4 As to the relevant court see note 1 supra.

5 As to the application see note 2 supra.

6 Law of Property Act 1925 s 3(5) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(1) IN GENERAL/189. Co-ownership.

5. CO-OWNERSHIP

(1) IN GENERAL

189. Co-ownership.

Land may be held by several persons having simultaneous interests, and formerly these interests might be of various kinds and might be present or future, both at law and in equity. Thus the co-owners might be joint tenants[1], tenants in common[2] or coparceners[3]. There was also a fourth form of co-ownership known as tenancy by entireties[4], confined to dispositions to husband and wife during coverture, where the wife's interest was not her separate property. Of these interests, tenancy by entireties no longer exists, and tenancy in common and ownership in coparcenary can no longer exist at law but only in equity.

On a transfer of registered land[5] to more than one transferee, a declaration of trust must now be completed as to the manner in which the transferees are to hold the property[6]. Similar information is required on an application for first registration[7].

1 As to joint tenancy since 1925 see PARA 190 post.

2 As to tenancies in common see PARA 207 et seq post.

3 As to the possibilities of such ownership still existing see PARA 224 et seq post.

4 As to this form of ownership and its conversion into joint tenancy see PARAS 227-228 post.

5 The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

6 See the Land Registration Rules 1925, SR & O 1925/1093, r 74(1), Sch 1, Form TR1 (respectively substituted and added by SI 1997/3037); and LAND REGISTRATION.

7 See the Land Registration Rules 1925, SR & O 1925/1093, r 19(1), Sch 1, Form FR1 (respectively substituted and added by SI 1997/3037); and LAND REGISTRATION.

UPDATE

189 Co-ownership

NOTE 6--SR & O 1925/1093 r 74(1) amended: SI 2001/619.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(i) How Joint Tenancies Arise/190. Joint tenancy since 1925.

(2) JOINT TENANCY

(i) How Joint Tenancies Arise

190. Joint tenancy since 1925.

A legal estate may still be held by two or more persons as joint tenants, but only in the capacity of trustees, either under the Settled Land Act 1925[1], or upon a trust of land. Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, it is now held in trust in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity[2]. A similar trust is imposed by statute where land is expressed to be conveyed to two or more persons as tenants in common, and such a conveyance operates to vest the legal estate in them as joint tenants[3]. Where on 1 January 1926 land was vested in more than four joint tenants, it remained vested in them, but no new trustees could be appointed until the number was reduced to less than four, and subsequently the number might not be increased beyond four[4]. The common law rules still determine whether the beneficial interests of co-owners are joint or several, and the incidents affecting them are largely governed by the common law.

1 Two or more persons may together constitute the tenant for life under the Settled Land Act 1925 (see s 19(2)), and may hold the legal estate accordingly: see SETTLEMENTS vol 42 (Reissue) PARA 761. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no settlement is deemed to be made under that Act on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

2 Law of Property Act 1925 s 36(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 4(1), (2)). For these purposes, 'settled land' means settled land under the Settled Land Act 1925: *Re Gaul and Houlston's Contract* [1928] Ch 689, CA. See further SETTLEMENTS; and see note 1 supra.

3 See further PARA 211 post. As to the vesting of land held in undivided shares on 31 December 1925 under the transitional provisions see PARA 55 et seq ante.

4 See the Trustee Act 1925 s 34(1).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(i) How Joint Tenancies Arise/191. Creation of joint tenancy at common law.

191. Creation of joint tenancy at common law.

At common law a joint tenancy arose only by the act of a person creating the estate, never by act of law; but the act need not have been lawful[1]. Thus the tenancy might arise by grant, devise or disseisin. Where land was granted to two or more persons for the same estate, whether an estate of freehold or of leasehold, and no words were added indicating that the grantees were to take separate interests, they became joint tenants[2]. Thus, a limitation to two or more persons for their lives made them joint tenants during their joint lives; and a limitation to them in fee or for years made them joint tenants in fee, or joint lessees[3]; but a joint tenancy in fee tail could only be limited to a man and a woman who were capable of lawful marriage[4]. A joint tenancy was created by similar limitations in a will[5]. Further, two or more persons who entered into possession without title under such circumstances that the statutes of limitation ran in their favour acquired a possessory title in joint tenancy[6] unless the circumstances were such as to show that they had several interests[7]. However, there were special cases in which, notwithstanding the absence of words of severance, a court of equity would declare that there was a tenancy in common in equity[8].

1 Littleton's Tenures s 278; 2 Bl Com (14th Edn) 180-181. Joint tenancy can arise in chattels real and personal as well as in real estate: Littleton's Tenures s 281. See also *Lady Shore v Billingsly* (1687) 1 Vern 482; *Willing v Baine* (1731) 3 P Wms 113 at 115; *Barnes v Allen* (1782) 1 Bro CC 181; *Morley v Bird* (1798) 3 Ves 628 at 630; and PERSONAL PROPERTY vol 35 (Reissue) PARA 1244.

2 2 Bl Com (14th Edn) 180; *Morley v Bird* (1798) 3 Ves 628. An intention shown that the survivor will have the whole may, it seems, override even words of severance: *Clerk v Clerk and Turner* (1694) 2 Vern 323. See also *Ward v Everet* (1699) 1 Ld Raym 422; *Stratton v Best* (1787) 2 Bro CC 233; *Re Schofield, Baker v Cheffins* [1918] 2 Ch 64. As to words of severance see PARA 209 post.

3 Littleton's Tenures s 277; 2 Bl Com (14th Edn) 180; Fearne's Contingent Remainders 35.

4 Co Litt 25b; Challis's Law of Real Property (3rd Edn) 366. See also PARAS 118 note 11 ante, 193 note 6 post.

5 2 Bl Com (14th Edn) 180; 6 Cru Dig (38 Devise c 15 s 1). See also WILLS vol 50 (2005 Reissue) PARA 678.

6 *Ward v Ward* (1871) 6 Ch App 789; *Bolling v Hobday* (1882) 31 WR 9; *Smith v Savage* [1906] 1 IR 469. This corresponds to the old rule that a joint estate might be gained by disseisin (Littleton's Tenures s 278; 2 Bl Com (14th Edn) 181), provided the disseisin was to the use of the disseisors; but a disseisin to the use of one made that one sole tenant (Littleton's Tenures s 278).

7 Thus, where beneficiaries entitled as tenants in common acquired the legal estate by possession, they acquired it as tenants in common (*MacCormack v Courtney* [1895] 2 IR 97; *Marten v Kearney* (1902) 36 ILT 117); but, if some beneficiaries entered to the exclusion of the rest, they acquired the legal title in their own shares as tenants in common, and in the other shares as joint tenants (*Smith v Savage* [1906] 1 IR 469; *Re Christie, Christie v Christie* [1917] 1 IR 17). In *Re Brown, Coyle v M'Fadden* [1901] 1 IR 298, this distinction was overlooked. See further LIMITATION PERIODS vol 68 (2008) PARA 1100. The legal estate will now necessarily be acquired in joint tenancy, but the disseisors may still take as tenants in common beneficially.

8 Thus, a conveyance to purchasers who provide the purchase money in unequal shares may constitute them tenants in common in equity, notwithstanding the form of the conveyance: *Robinson v Preston* (1858) 4 K & J 505; *Bull v Bull* [1955] 1 QB 234, [1955] 1 All ER 253, CA. See further GIFTS vol 52 (2009) PARA 241 et seq; TRUSTS vol 48 (2007 Reissue) PARA 713 et seq. See also *Taylor v Fleming* (prior to 1677) cited in Freem Ch at 23; *Rigden v Vallier* (1751) 3 Atk 731 at 735; *Rea v Williams* (circa 1734) 2 Sugden's Vendors and Purchasers (11th Edn), Appendix, 1116 (conveyance); *Aveling v Knipe* (1815) 19 Ves 441 (contract to purchase). If an intention to create a tenancy in common appeared on the face of the conveyance, contribution to the purchase money in equal shares did not convert such tenancy into a joint tenancy: *Fleming v Fleming* (1855) 5 I Ch R 129. As to the case of mortgagees see MORTGAGE vol 77 (2010) PARA 101 et seq; as to purchases by partners see *Re Fuller's Contract* [1933] Ch 652 (cited in PARA 55 note 4 ante); and PARTNERSHIP vol 79 (2008) PARA 119; and as to other businesses see *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549, [1986] 1 All ER 711, PC. Moreover, provisions for children under a marriage settlement are, if possible, construed as tenancies in common (*Marryat v Townly* (1748) 1 Ves Sen 102; *Rigden v Vallier* supra; *Taggart v Taggart* (1803) 1 Sch & Lef 84 at 88; *Liddard v Liddard* (1860) 28 Beav 266; *Mayn v Mayn* (1867) LR 5 Eq 150; *Re Bellasis' Trust* (1871) LR 12 Eq 218); and it seems that in a will a provision for maintenance may turn a prima facie joint tenancy into a tenancy in common (*Re Gardner, Ellis v Ellis* [1924] 2 Ch 243); but a presumption of joint tenancy is not rebutted by a provision for advancement (*Fogarty v Fogarty* (1923) 57 ILT 146). As to the nature of, and usual provisions contained in, such settlements see SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(i) How Joint Tenancies Arise/192. Corporations as joint tenants.

192. Corporations as joint tenants.

At common law, a corporation aggregate could not be joint tenant with an individual or another corporation aggregate, whether of freeholds[1] or of chattels real[2]; nor could a corporation sole be joint tenant with an individual or another corporation sole of freeholds[3], although perhaps it was otherwise as regards chattels real[4]. However, by statute a body corporate is capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy, they are entitled to the property as joint tenants[5].

The acquisition and holding of property by a body corporate in joint tenancy is subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty[6].

Where a body corporate is joint tenant of any property, then on its dissolution the property devolves on the other joint tenant[7].

1 Bac Abr, Joint Tenants (B); 2 Bl Com (14th Edn) 184. As to the acquisition of land by corporations see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1247 et seq.

2 See *Law Guarantee and Trust Society v Governor & Co of Bank of England* (1890) 24 QBD 406 at 411.

3 Littleton's Tenures s 297; Co Litt 189b-190a.

4 See Co Litt 190c.

5 Bodies Corporate (Joint Tenancy) Act 1899 s 1(1).

6 Ibid s 1(1) proviso.

7 Ibid s 1(2).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(ii) Incidents of Joint Tenancy/193. Nature of joint tenants' interests.

(ii) Incidents of Joint Tenancy

193. Nature of joint tenants' interests.

Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act[1]. The interest of each is the same in extent[2], nature[3] and duration[4]. In the case of freeholds, the seisin, and, in the case of leaseholds, the possession, is vested in all; none holds any part to the exclusion of the others[5]. At common law the interest of each must vest at the same time[6]. These are the four unities of title, interest, possession and time[7], but in joint tenancy arising (formerly) by limitations under the Statute of Uses[8], or under devises by will[9], the fourth unity was not essential, and the interests of the various joint tenants might vest at different times.

1 2 Bl Com (14th Edn) 180.

2 Until severance, each has the whole, but upon severance each has an aliquot part (a half or less) according to the number of joint tenants. As to severance, which can now take effect only in respect of the equitable interests, see PARA 198 et seq post.

3 There can be no joint tenancy between owners of a freehold and a term, or of a freehold in possession and a freehold in reversion: Co Litt 188a.

4 The estates, so far as regards the joint tenancy, must be the same, although one joint tenant may have a further estate in severalty. Thus a grant to A and B for their lives, and to the heirs of A, gives a joint tenancy to A and B for their lives, and the remainder in fee to A: Littleton's Tenures s 285; 2 Bl Com (14th Edn) 181. Coke probably refers to such a limitation when he speaks of 'two joint tenants, the one for life and the other in fee': Co Litt 188a. However, in one case the effect of a severance is to give the joint tenants separate estates of different duration. Thus, if there are joint tenants for life, each has an estate for the joint lives, with the chance of taking as survivor an estate for the rest of his life; but upon a severance each has an estate in a moiety for his own life. Thus, unless they should die together, the severance must be to the advantage of the remainderman (Co Litt 191a; 2 Bl Com (14th Edn) 187); and it is the same if the limitation is to the joint tenants for their lives, and the life of the survivor of them, since this last limitation expresses no more than the law implies and is superfluous (Co Litt 191a; 2 Preston's Abstracts of Title 63). In a limitation to two and the survivor of them in fee simple, the reference to the survivor turns the estate into a joint estate for lives with a contingent fee simple in remainder to the survivor: Co Litt 191a, Butler's note (1); *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658 at 678, HL. See also PARA 170 note 6 ante. Thus where it is intended to limit a joint tenancy in fee these words must not be inserted: Co Litt 191a, Butler's note (1); Challis's Law of Real Property (3rd Edn) 368. The joint interests previously mentioned, except a joint tenancy in fee simple in possession, may now take effect only as equitable interests.

5 Joint tenants are seised of the land *per mie et per tout*: Littleton's Tenures s 288. This is sometimes erroneously thought to mean by the half and by the whole, but the effect of '*mie*' is 'not in the least' (see *Murray v Hall* (1849) 7 CB 441 at 455), and the true meaning is that 'each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately' (see Co Litt 186a). See also *Nielson-Jones v Fedden* [1975] Ch 222 at 228, [1974] 3 All ER 38 at 43.

6 Thus, if there was a grant to A for life, remainder to the right heirs of B and C, this was a contingent remainder to the heirs of B and C as tenants in common, since the heirs were not ascertained until the respective deaths of B and C, and the remainders therefore vested at different times (Co Litt 188a); and a grant to two persons who could not marry and the heirs of their bodies gave them joint estates for life and several inheritances (Littleton's Tenures ss 283, 284; Co Litt 182a et seq; *Cook v Cook* (1706) 2 Vern 545 at 546). See also Fearne's Contingent Remainders 36. As to a similar gift to two persons who could marry see Co Litt 20b, 26b; *Huntley's Case* (1574) 3 Dyer 326a; *Pery v White* (1778) 2 Cowp 777; *Edwards v Champion* (1853) 3 De GM & G 202 at 215; *Re Tiverton Market Act, ex p Tanner* (1855) 20 Beav 374.

7 2 Bl Com (14th Edn) 180; 2 Cru Dig (18 Joint Tenancy c 1 s 11). Blackstone seems to have been the first to perceive the four unities, and he uses them to analyse the differences between the various forms of co-ownership with much ingenuity. Challis's disparagement seems uncalled for: Challis's Law of Real Property (3rd Edn) 367; cf 2 Preston's Abstracts of Title 62.

8 Statute of Uses (1535) (repealed: see PARA 18 note 10 ante). See Co Litt 188a; *Hales v Risley* (1673) Poll 369 at 373; *Earl of Sussex v Temple* (1698) 1 Ld Raym 310; *Stratton v Best* (1787) 2 Bro CC 233; *Doe d Hallen v Ironmonger* (1803) 3 East 533; 2 Preston's Abstracts of Title 67. Blackstone brings all joint estates within the unity of time by making future uses relate back to the time of the original limitation; but in fact uses are not within this unity.

9 *Oates d Hatterley v Jackson* (1742) 2 Stra 1172; *Kenworthy v Ward* (1853) 11 Hare 196; *Morgan v Britten* (1871) LT 13 Eq 28; *Surtees v Surtees* (1871) LR 12 Eq 400 at 406; *Binning v Binning* [1895] WN 116. A remainder which is to vest only in such of a class as attain 21 years cannot be a joint tenancy: *Woodgate v Unwin* (1831) 4 Sim 129. See also *M'Gregor v M'Gregor* (1859) 1 De GF & J 63 at 74; *Hand v North* (1863) 10 Jur NS 7.

194. Incidents of joint tenancy as regards interests of joint tenants.

From the fact that each joint tenant is seised of the whole it follows that the appropriate mode of conveyance when one joint tenant wishes to vest the entire interest in the other joint tenant or joint tenants is by release[1], although this can now also be effected by grant[2]; and it follows that in actions as to the joint estate one joint tenant may not sue or be sued without joining the others[3], and a judgment for possession against one joint tenant is not an effective judgment[4]. One joint tenant may not part with the title deeds of the property without the consent of the other[5]. Nor can one of several joint lessees surrender rights held jointly before the full period of the lease has run[6]; but in the case of a periodic tenancy a notice given by one of several joint lessors[7] or joint lessees[8] is effective to determine the tenancy, because such a tenancy only continues for a further period so long as all the parties concur[9]. The act of one personal representative was, however, at common law the act of all, and one of several personal representatives could assign or surrender a term[10]. Now by statute all the personal representatives must concur in a conveyance of real estate, or a contract for such a conveyance[11], but a denial of a landlord's title by one of several personal representatives of a lessee is not a conveyance, and may still work a forfeiture of the lease[12].

1 Co Litt 9b. In such a case the release operates by extinguishment of the estate of the releasor, and the entirety is then vested exclusively in the other joint tenant or joint tenants. However, if the release was made by A, one of three joint tenants A, B and C, to another B solely, this operated to pass the estate (*mitter l'estate*) of A to B, and was a severance as regards that share; so that B held the undivided third part as tenant in common with himself and C; and the undivided two-third parts were held by B and C as joint tenants: Littleton's Tenures ss 304, 312. As to severance see PARA 198 et seq post. The power of one joint tenant to release his interest to the other joint tenants is expressly preserved by the Law of Property Act 1925 s 36(2) (as amended): see PARA 198 post.

2 See ibid s 72(4). Formerly such a grant was inoperative, but it would be construed as a release: *Eustace v Scawen* (1624) Cro Jac 696; *Chester v Willan* (1670) 2 Saund 96.

3 Littleton's Tenures s 321; 2 Bl Com (14th Edn) 182; *Williams v British Gas Corpn* (1980) 41 P & CR 106, Lands Tribunal.

4 *Gill v Lewis* [1956] 2 QB 1, [1956] 1 All ER 844, CA.

5 *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 222, [1984] 1 All ER 144 at 152 per Mann J; affd [1985] QB 210 at 241, [1984] 2 All ER 585 at 600, CA. Accordingly, a deposit of title deeds by one without such consent could not create an equitable charge over the property: *Thames Guaranty Ltd v Campbell* supra. Since 27 September 1989, it has been impossible to create a mortgage merely by the deposit of title deeds: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. As to the right to custody of title deeds see PARA 87 ante.

6 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Hounslow London Borough Council v Pilling* [1994] 1 All ER 432, [1993] 1 WLR 1242, CA.

7 *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, [1992] 1 All ER 1, HL; *Harrow London Borough Council v Johnstone* [1997] 1 All ER 929, [1997] 1 WLR 459, HL; *Doe d Aslin v Summersett* (1830) 1 B & Ad 135.

8 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA.

9 As to periodic tenancies and notice given by co-owners see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 226.

10 *Simpson v Gutteridge* (1816) 1 Madd 609. See also *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280.

11 See the Administration of Estates Act 1925 s 2(2) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 ss 16(1), 21(2), Sch 2). Wide definitions are given by the Administration of Estates Act 1925 to the expressions 'conveyance' and 'real estate': 'conveyance' includes a mortgage, charge by way of legal mortgage, lease, assent, vesting, declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will (see s 55(1)(iii)); and 'real

estate' includes chattels real, and land in possession, remainder or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and real estate held on trust, including settled land, or by way of mortgage or security, but not money secured or charged on land (see ss 3(1), 55(1)(xix) (s 3(1) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 27(2), Sch 4)).

12 *Warner v Sampson* [1958] 1 QB 404, [1958] 1 All ER 44; revsd on other grounds [1959] 1 QB 297, [1959] 1 All ER 120, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(ii) Incidents of Joint Tenancy/195. Jus accrescendi (right of survivorship).

195. Jus accrescendi (right of survivorship).

The death of one joint tenant creates no vacancy in the seisin or possession. His interest is extinguished. If there were only two joint tenants, the survivor is now seised or possessed of the whole. If there were more than two, the survivors continue to hold as joint tenants. This incident, which is called the jus accrescendi, is the most important feature of joint tenancy[1].

1 Littleton's Tenures s 280; Co Litt 181a; 2 Bl Com (14th Edn) 183; 2 Preston's Abstracts of Title 57. It does not follow that the chance of survivorship is always of the same value to each joint tenant. Thus, upon a joint estate to A and B for the life of A, if B dies A has the whole survivorship, but if A dies there is nothing for B to take: Co Litt 181b. The jus accrescendi makes the deducing of title much simpler where co-owners are joint tenants than where they are tenants in common, and the provisions of the 1925 legislation vesting the legal estate in joint tenants in all cases (see PARA 190 ante), coupled with the powers of trustees or of statutory owners or the tenant for life of settled land to overreach equitable interests (see PARA 247 et seq post), have considerably simplified conveyancing in all cases where concurrent interests in land have existed since 1925. See also PARA 204 post; and see generally SALE OF LAND.

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196. Account between joint tenants.

At common law no action of account could be maintained by a joint tenant against another joint tenant who had occupied the whole property unless he had constituted the occupying tenant his bailiff, so as to make him liable to account as such[1]. However, a right to account as between joint tenants was given by statute[2]; and an action of account lay where the joint tenant had been in sole occupation, as well as where he had been in receipt of the rents[3]. However, since a beneficial joint tenancy now introduces the relationship of trustee and beneficiary, the equitable liability to account is sufficient and the statutory provision is repealed[4]. Joint tenants are not otherwise in a fiduciary relation to one another[5].

1 Co Litt 186a, 200b; *Pulteney v Warren* (1801) 6 Ves 73 at 77.

2 Administration of Justice Act 1705 s 27 (repealed). In equity one co-owner is liable to account at the suit of the others: *Strelly v Winson* (1684) 1 Vern 297.

3 *Eason v Henderson* (1848) 12 QB 986; revsd on the facts (1851) 17 QB 701, Ex Ch. As to the effect of one joint tenant taking possession of the entirety of the land or of the rents and profits see LIMITATION PERIODS vol 68 (2008) PARA 1094.

4 The Administration of Justice Act 1705 s 27 was repealed by the Law of Property (Amendment) Act 1924 ss 10, 12, Sch 10 (repealed).

5 *Kennedy v De Trafford* [1897] AC 180, HL.

197. Contribution.

A joint tenant could not compel the other joint tenants to contribute to the cost of repairs[1]; but, in a partition action (now obsolete)[2] or an order by the court for sale of the property, he was allowed sums properly spent on substantial repairs and improvements[3]. In such an action he could be charged with any excess of rents and profits received by him[4], or, in certain circumstances if he had been in sole occupation, with an occupation rent[5]. It has been judicially stated that a court of equity will order an inquiry and payment of an occupation rent in any case in which it is necessary to do equity between the parties that an occupation rent should be paid. This will generally be so where one co-owner has ousted the other, but the fact that there has not been an ouster or forceful exclusion is far from conclusive. Where the property in question is the matrimonial home and the marriage has broken down: (1) the prima facie conclusion will be that the party who leaves has been excluded, so that an occupation rent should be paid by the remaining co-owner; (2) however, this is not a rule of law and, if the co-owner left voluntarily but would be welcome back and would be in a position to enjoy his right to occupy, the remaining co-owner will not normally be charged an occupation rent; (3) it appears likely that, prima facie, the presentation of a petition for divorce by the party remaining in occupation will be taken by the Court to signify a refusal to take the other party back into the matrimonial home and a willingness to pay an occupation rent thereafter[6].

1 *Leigh v Dickeson* (1884) 15 QBD 60, CA.

2 As to partition actions see PARA 216 post.

3 *Swan v Swan* (1819) 8 Price 518; *Pascoe v Swan* (1859) 27 Beav 508; *Leigh v Dickeson* (1884) 15 QBD 60, CA. The amount allowed for improvements, or for the repayment of mortgage instalments, is the lesser of the actual expenditure and any increase in the value of the property realised thereby: *Re Pavlou (A Bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046. The guiding principle in equitable accounting is that neither party should take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it. The proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure of one of them: *Re Pavlou (A Bankrupt)* supra. For the purpose of equitable accounting, there is no distinction between a beneficial tenancy in common and a beneficial joint tenancy: *Re Pavlou (A Bankrupt)* supra.

4 *Hyde v Hindly* (1794) 2 Cox Eq Cas 408; *Lorimer v Lorimer* (1820) 5 Madd 363.

5 *Turner v Morgan* (1803) 8 Ves 143 at 145; *Teasdale v Sanderson* (1864) 33 Beav 534. However, an occupation rent could not be set off against the occupying co-owner's share of the proceeds of sale as against a mortgagee, although it might have been set off as against him personally: *Hill v Hickin* [1897] 2 Ch 579.

6 See *Re Pavlou (A Bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046 per Millett J. See also *Jones v Jones* [1977] 2 All ER 231, [1977] 1 WLR 438, CA (property owned by a stepmother and son as tenants in common; no occupation rent payable); *Dennis v McDonald* [1981] 2 All ER 632, [1981] 1 WLR 810; on appeal [1982] Fam 63, [1982] 1 All ER 590, CA (property owned by former cohabitees as tenants in common in equal shares; occupation rent ordered); *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA (former cohabitees; occupation rent ordered); *Re Gorman (A Bankrupt)* [1990] 1 All ER 717, [1990] 1 WLR 616, DC. Cf *Chhokar v Chhokar* [1984] FLR 313, CA (applying a test of whether it would be 'fair' to require the occupying co-owner to pay an occupation rent). For an approach to quantifying the rent see *Dennis v McDonald* supra. In some circumstances, the court will apply a rule of convenience and treat mortgage payments (either in total or as to interest only) made by the party in occupation as equivalent to an occupation rent: *Suttill v Graham* [1977] 3 All ER 1117, [1977] 1 WLR 819, CA; *Dennis v McDonald* supra at 639 and at 818 (varied on another point on appeal: see supra); *Re Gorman (A Bankrupt)* supra at 725-726 and 626, obiter, per Vinelott J.

(iii) Severance of Joint Tenancies

198. General rule.

The joint tenancy may be severed either by one joint tenant as to his own share or generally by all the joint tenants. Before 1926, the joint tenancy could be severed at law, so as to create a tenancy in common, but no such severance is now permissible[1]. Further, without prejudice to the right of a joint tenant to release his interest to the other joint tenants, no severance of a mortgage term or trust estate, so as to create a tenancy in common, is permissible[2]. However, it is still possible to sever a joint tenancy in an equitable interest, whether or not the legal estate is vested in the joint tenants[3]. Where a legal estate (not being settled land) is vested in joint tenants beneficially, any tenant may sever the joint tenancy in equity by notice in writing to the other joint tenants[4] or by doing such other acts and things as would in the case of personal estate be effectual to sever the tenancy in equity[5]. The rules as to severance of a joint tenancy in personal estate do not seem to differ from those which were formerly applicable to real estate and, apart from severance by notice, the same rules seem to apply whether or not the legal estate is vested in the joint tenants. The continuance of the joint tenancy depends on the maintenance of the unities of title, interest and possession, and the destruction of any of these unities formerly led to a severance of the tenancy at law and to the creation of a tenancy in common[6], and now has the like effect in equity. Where there is a joint tenancy in either income or capital, the joint tenancy in the income is severed as to each instalment as it becomes payable, without actual payment, and consequently on the death of a joint tenant his personal representatives are entitled to his share of any income which has become payable before his death, although it may have been accumulated by the trustees[7].

1 See the Law of Property Act 1925 s 36(2).

2 Ibid s 36(3).

3 See ibid s 36(2). For the meaning of 'legal estate' and 'equitable interest' see PARAS 46-47 ante.

4 As to notice of severance see further PARA 204 post.

5 See the Law of Property Act 1925 s 36(2) proviso (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 4(1), (3)(a)).

6 See 2 Bl Com (14th Edn) 185. As to these unities see PARA 193 ante. As to the methods of severing a joint tenancy see generally *Williams v Hensman* (1861) 1 John & H 546; *Re Denny, Stokes v Denny* [1947] LJR 1029; *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353. Where a beneficial joint tenancy was expressly created, the shares of the tenants in common on severance are equal: *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, CA.

7 *Walmsley v Foxhall* (1870) 40 LJ Ch 28; *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353.

UPDATE

198 General rule

NOTE 5--See *Wallbank v Price* [2007] EWHC 3001 (Ch), [2008] 3 FCR 444 (declaration by wife severed joint tenancy in equity and declared trust of share in favour of daughters').

199. Severance in title.

The unity of title is destroyed when one joint tenant assigns[1] or mortgages[2] his share to a third person. If there are only two joint tenants, this creates a tenancy in common in equity between the assignee and the other joint tenant[3]; if there are more than two, it creates a tenancy in common in equity between the assignee and the other joint tenants; although, as between the other joint tenants, the joint tenancy continues[4]. The effect is the same where one joint tenant becomes bankrupt[5]. A lease for years by one of two joint tenants in fee of his share did not, it seems, sever the joint tenancy at common law, and it was binding on the other joint tenant after the death of the lessor, whether the lessee entered during the life of the lessor or not[6]. Where a term of years was held in joint tenancy, a lease by one joint tenant for a term less than the residue severed the joint tenancy[7]. An incumbrance created by a joint tenant, such as a rentcharge or profit à prendre, which did not pass an interest in the land itself but could be satisfied out of the grantor's share of the rents and profits, was not binding on the surviving joint tenant[8]. A lease of the whole property by both joint tenants, where the rent was reserved to them jointly, did not sever or suspend the joint tenancy[9].

1 Littleton's Tenures s 292; *Partricke v Powlet* (1740) 2 Atk 54; *Daly v Aldworth* (1863) 15 I Ch R 69 (marriage settlement); *Ahmed v Kendrick* (1988) 56 P & CR 120, CA. A purported conveyance of the whole property by one joint tenant to a third party will operate to sever the joint tenancy and transfer the severed beneficial interest of the conveying joint tenant: see the Law of Property Act 1925 s 63; *Ahmed v Kendrick* supra; cf *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA. A partial disposition of his share by one joint tenant to the other may effect a severance: *Re Armstrong* [1920] 1 IR 239.

2 *York v Stone* (1709) 1 Salk 158; *Re Pollard's Estate* (1863) 3 De GJ & Sm 541; *Re Sharer, Abbott v Sharer* (1912) 57 Sol Jo 60; *Cedar Holdings v Green* [1981] Ch 129 at 138, [1979] 3 All ER 117 at 121, CA, per Buckley LJ; *First National Securities v Hegerty* [1985] QB 850 at 854, [1984] 1 All ER 139 at 142, obiter, per Bingham J; affd [1985] QB 850, [1984] 3 All ER 641, CA.

3 See note 1 supra.

4 Littleton's Tenures s 294. As to a release by a joint tenant to one of the other joint tenants see PARA 194 note 1 ante.

5 *Re Dennis (A Bankrupt)* [1996] Ch 80, [1995] 3 All ER 171, CA; *Re Gorman (A Bankrupt)* [1990] 1 All ER 717 at 724, [1990] 1 WLR 616 at 624, DC, per Vinelott J; *Re Pavlou (A Bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046. The effect is the same because the share of the joint tenant vests in his trustee in bankruptcy: see *Re Butler's Trusts, Hughes v Anderson* (1888) 38 ChD 286, CA. As to the date on which severance is effected in the case of bankruptcy see *Re Dennis (A Bankrupt)* supra. An insolvency administration order under the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, does not effect a severance, even if combined with a declaration under the Insolvency Act 1986 s 283 (as amended) that the trustee's title dates back to the date of death: *Re Palmer (A Debtor)* [1994] Ch 316, [1994] 3 All ER 835, CA.

Under the former law a severance was not effected by the marriage of a female joint tenant: see Co Litt 185b; *Bracebridge v Cook* (1572) 2 Plowd 416; *Re Hoban, Lonergan v Hoban* [1896] 1 IR 401; *Palmer v Rich* [1897] 1 Ch 134. See also *Re Barton's Will Trusts* (1852) 10 Hare 12; *Armstrong v Armstrong* (1869) LR 7 Eq 518; *Re Butler's Trusts, Hughes v Anderson* (1888) 38 ChD 286, CA, overruling on this point *Baillie v Treharne* (1881) 17 ChD 388.

Where A and B were joint tenants in fee and A granted his interest to a stranger X for life, X and B held the immediate interest by different titles and consequently they were tenants in common: Littleton's Tenures s 302; Co Litt 191b. However, the joint tenancy was only suspended. If during the suspension either A or B died, there was no right of survivorship and the tenancy was permanently severed; since for the right of survivorship to accrue, the land must be held in joint tenancy at the time of the death of him that dies first: Co Litt 188a. If X died during the joint lives, the joint tenancy revived: Co Litt 193a. See also 2 Preston's Abstracts of Title 59; and cf Challis's Law of Real Property (3rd Edn) 367n.

6 Littleton's Tenures s 289; Co Litt 185a. See, however, to the contrary, *Clerk v Clerk and Turner* (1694) 2 Vern 323, where the lease was for 80 years to commence on the death of the lessor, if the other joint tenant should so long live. As to the lessee holding discharged from the rent see *Anon* (1560) 2 Dyer 187a.

7 Co Litt 192a; Littleton's Tenures s 319; *Sym's Case* (1584) Cro Eliz 33; 2 Preston's Abstracts of Title 60; *Cowper v Fletcher* (1865) 6 B & S 464 at 472; *Conolly v Conolly* (1866) 17 I Ch R 208 at 223.

8 *Jus accrescendi praefertur oneribus* (ie the right of survivorship is preferred to incumbrances): Littleton's Tenures s 286; Co Litt 185a; 2 Preston's Abstracts of Title 58. See also *Lord Abergavenny's Case* (1607) 6 Co Rep 78b.

9 *Palmer v Rich* [1897] 1 Ch 134. Such a lease might now be made by them as trustees of the legal estate.

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200. Severance of joint tenancies by contract.

Severance in title[1] results from the destruction of unity of title ensuing from an actual disposition of his share by one joint tenant[2]. A completed disposition of the share is not necessary. A mere contract to sell a share[3], or a covenant in a marriage settlement to settle a share[4], even where the title to the property accrues after the marriage[5], or even if the convenantor was a minor at the date of the settlement and has not avoided it at majority[6], effects a severance.

1 As to severance in title see PARA 199 ante.

2 This is the first mode of severance of the three modes specified in *Williams v Hensman* (1861) 1 John & H 546 at 557. The act of any one of the persons interested operating on his own share may create a severance as to that share; each one is at liberty to dispose of his own interest in such a manner as to sever it from the joint fund. However, there will be no severance if the contract or conveyance relied upon was a sham: *Penn v Bristol and West Building Society* [1995] 2 FLR 938 (revsd in part on another point [1997] 3 All ER 470, [1997] 1 WLR 1356, CA).

3 *Brown v Raindle* (1796) 3 Ves 256; *Kingsford v Ball* (1852) 2 Giff App 1. Cf *Musgrave v Dashwood* (1688) 2 Vern 63. An agreement for sale of the entirety does not result in a severance as regards the purchase money: *Hayes' Estate* [1920] 1 IR 207.

4 *Caldwell v Fellowes* (1870) LR 9 Eq 410; *Baillie v Treharne* (1881) 17 ChD 388.

5 *Re Hewett, Hewett v Hallett* [1894] 1 Ch 362.

6 *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416.

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201. Severance of joint tenancies by mutual agreement or conduct.

If joint tenants enter into a mutual agreement to hold as tenants in common, there is a severance[1], even though it takes effect only in equity[2]. Subsequent conduct of all the joint tenants may effect a severance[3], but the mere fact that the joint tenants employ the land for

the purpose of a partnership business does not sever the joint tenancy[4], and the receipt of a share of the proceeds of sale of part of an estate does not necessarily sever the joint tenancy in equity as to the rest[5].

A unilateral declaration of intention to sever, if communicated to the other joint tenants, may be sufficient to effect a severance[6].

1 2 Cru Dig (18 Joint Tenancy c 2 s 46); *Frewen v Relfe* (1787) 2 Bro CC 220. This is the second mode of severance specified in *Williams v Hensman* (1861) 1 John & H 546 at 557. An agreement by joint tenants for disposal of the property by their respective wills, followed by the making of wills accordingly, operates as a severance: *Re Wilford's Estate, Taylor v Taylor* (1879) 11 ChD 267; *Re Heys, Walker v Gaskill* [1914] P 192. The agreement need not be specifically enforceable: *Burgess v Rawnsley* [1975] Ch 429, [1975] 3 All ER 142, CA (agreement by one of two joint tenants to sell his interest to the other held to sever the joint tenancy although the agreement was unenforceable because it was not in writing and was subsequently repudiated); *Hunter v Babbage* (1994) 69 P & CR 548, [1995] 1 FCR 569.

2 As to a tenancy in common existing only in equity see PARA 207 post, and as to the creation of a tenancy in common by severance of a joint tenancy see PARA 208 post.

3 This is the third mode of severance specified in *Williams v Hensman* (1861) 1 John & H 546 at 557. There may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common: *Palmer v Rich* [1897] 1 Ch 134. See also *Jackson v Jackson* (1804) 9 Ves 591 at 598, 604; *Wilson v Bell* (1843) 5 I Eq R 501; *Re Denny, Stokes v Denny* [1947] LJR 1029; *Greenfield v Greenfield* (1979) 38 P & CR 570 (conversion of house into two self-contained maisonettes did not cause severance); *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257 (inclusion of the property for tax purposes in the draft accounts of a partnership carried on by the joint tenants did not constitute a course of dealing sufficient to sever the joint tenancy); *Gore and Snell v Carpenter* (1990) 60 P & CR 456 (negotiations before divorce not a sufficient course of dealing); *McDowell v Hirschfield, Lipson & Rumney v Smith* [1992] 2 FLR 126 (negotiations before divorce). 'Without prejudice' correspondence is admissible to show severance by a course of dealing: *McDowell v Hirschfield, Lipson & Rumney v Smith* supra.

4 *Brown v Oakshot* (1857) 24 Beav 254; *Ward v Ward* (1871) 6 Ch App 789. See also PARTNERSHIP vol 79 (2008) PARAS 11, 118, 119; and *Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257 (cited in note 3 supra.). As to co-owners of mines and quarries see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 366-370.

5 *Leak v MacDowall* (1862) 32 Beav 28 at 30. Cf *Re Denny, Stokes v Denny* [1947] LJR 1029, where the evidence showed a course of dealing sufficient to intimate that the interests of the co-owners were mutually treated as constituting a tenancy in common.

6 It was held sufficient by Plowman J in *Re Draper's Conveyance, Nihan v Porter* [1969] 1 Ch 486, [1967] 3 All ER 853, following a dictum of Havers J in *Hawkesley v May* [1956] 1 QB 304 at 313, [1955] 3 All ER 353 at 356 (approved on its facts in *Harris v Goddard* [1983] 3 All ER 242, [1983] 1 WLR 1203, CA); cf *Nielson-Jones v Fedden* [1975] Ch 222, [1974] 3 All ER 38. In *Burgess v Rawnsley* [1975] Ch 429, [1975] 3 All ER 142, CA, both views were expressed: see at 440 and at 148 per Lord Denning MR (declaration of intention sufficient), and at 448 and 154 per Sir John Pennycuick (declaration of intention not sufficient). Browne LJ, the third member of the court, did not express any view on the point. A declaration in writing of an intention to sever, if communicated to the other joint tenants, may operate as a notice under the Law of Property Act 1925 s 36(2) proviso (as amended): see PARA 204 post.

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201 Severance of joint tenancies by mutual agreement or conduct

NOTE 3--See also *Carr v Isard* [2006] EWHC 2095 (Ch), [2007] WTLR 409 (insufficient evidence to establish course of dealing).

202. Severance in interest.

The unity of interest is destroyed, and the joint tenancy severed, but only in equity[1], when there are joint tenants for life, and one of them acquires the entirety of the reversion[2]; or where there is a tenancy for life, remainder to joint tenants in fee, and the tenant for life grants his estate to one of the joint tenants[3].

1 As to a tenancy in common existing only in equity see PARA 207 post.

2 *Wiscot's Case, Giles v Wiscot* (1599) 2 Co Rep 60b. The one, A, acquiring the reversion holds an undivided half in fee. The other half is held by the other joint tenant B for life, remainder to A in fee. This diversity of interests severs the joint tenancy: Co Litt 182b.

3 Thus, if the limitations are to A for life, remainder to B and C in fee, and A grants his life estate to B, B is immediately entitled to one undivided half in fee, and to the other half for the life of A with remainder to C in fee (Co Litt 182b, 183a); but, if A surrenders his life estate to B, this inures to the benefit of both B and C, and they are joint tenants in fee in possession (Co Litt 183a note (2)).

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203. Severance of possession.

The unity of possession is destroyed and the joint tenancy severed upon a partition of the land between the joint tenants; and this may be done by agreement or under the statutory powers conferred on trustees of land[1].

1 As to partition at common law, which in the case of joint tenants could only be made by agreement, and as to partition under the statutes in force before 1926, see further PARA 216 et seq post. As to partition under the powers conferred by the Trusts of Land and Appointment of Trustees Act 1996 s 7 (substantially re-enacting the Law of Property Act 1925 s 28(3), (4) (repealed)) see PARA 223 post; and SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(iii) Severance of Joint Tenancies/204. Severance of joint tenancies by notice.

204. Severance of joint tenancies by notice.

Severance of a joint tenancy cannot be effected by will[1]; nor formerly could it be effected by a mere statement of intention to sever[2]; but in this last respect the law has been altered, and where a legal estate, not being settled land, is vested in joint tenants beneficially, the joint tenancy in equity may now be severed by notice in writing given by any one joint tenant to the others, whereupon the land is held in trust on terms which would have been requisite for giving effect to the beneficial interest if there had been an actual severance[3].

1 2 Cru Dig (18 Joint Tenancy c 2 s 19). Before 55 Geo 3 c 192 (Disposition of Copyhold Estates by Will) (1815) (replaced by the Wills Act 1837) when, to effect a devise of copyholds, a surrender to the use of the will was necessary, such a surrender worked a severance: Co Litt 59b; *Porter v Porter* (1605) Cro Jac 100; *Gale v Gale* (1789) 2 Cox Eq Cas 136; *Edwards v Champion* (1847) 1 De G & Sm 75; *Edwards v Champion* (1853) 3 De GM & G 202 at 216-217.

2 *Moyse v Gyles* (1700) Prec Ch 124; *Partriche v Powlet* (1740) 2 Atk 54.

3 See the Law of Property Act 1925 s 36(2) proviso (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 4(1), (3)(a)); and PARA 198 ante. Where a legal estate is vested in joint tenants beneficially it will usually not be settled land, but it would be so if the land were subject to a family charge created by an instrument coming into operation prior to 1 January 1997: see the Settled Land Act 1925 s 1(1)(v); the Trusts of Land and Appointment of Trustees Act 1996 ss 2(6), 27(2), Sch 1 para 3; *Re Gaul and Houlston's Contract* [1928] Ch 689, CA. There seems to be no reason for excluding the possibility of severance by notice in this case, or in cases where the land is vested in trustees on trust for joint tenants other than themselves.

A notice in writing of a desire to sever under the Law of Property Act 1925 s 36(2) (as amended) takes effect forthwith. To be effective, it must evince an intention to bring about the wanted result immediately and show an intent to bring about the statutory consequences set out in s 36(2) (as amended): *Harris v Goddard* [1983] 3 All ER 242, [1983] 1 WLR 1203, CA; *Hunter v Babbage* (1994) 69 P & CR 548. The issue of an originating summons seeking an order that the property be sold and that the proceeds of sale be distributed in accordance with the respective interests of the parties, coupled with the swearing of an affidavit requesting that the proceeds be distributed equally, has been held a sufficient notice: see *Re Draper's Conveyance, Nihan v Porter* [1969] 1 Ch 486, [1967] 3 All ER 853 (approved in *Harris v Goddard* supra). Cf *Nielson-Jones v Fedden* [1975] Ch 222 at 236, [1974] 3 All ER 38 at 50 per Walton J. A notice in writing which shows no more than a desire to bring the existing interest to an end is not a good notice under the Law of Property Act 1925 s 36(2) (as amended), nor is a divorce petition which, when served, includes in its prayer a request in general terms for the exercise of the jurisdiction given to the court by the Matrimonial Causes Act 1973 s 24 (prospectively substituted by the Family Law Act 1996 s 15, Sch 2, as from a day to be appointed under s 67(3)): *Harris v Goddard* supra. See also *Burgess v Rawnsley* [1975] Ch 429 at 447, [1975] 3 All ER 142 at 154, CA, per Sir John Pennycuick. Service of the notice in accordance with the Law of Property Act 1925 s 196(4) is sufficient: *Re 88 Berkeley Road, NW9, Rickwood v Turnsek* [1971] Ch 648, [1971] 1 All ER 254 (notice sent by recorded delivery but not received by addressee). Any notice required or authorised to be served or given by the Law of Property Act 1925 must be in writing: s 196(1). In general, it is sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the person to be served, or if it is sent by post in a registered letter addressed to the person to be served, by name, at that place of abode or business and if that letter is not returned through the post office undelivered; and that service is deemed to be made at the time at which the registered letter would in the ordinary course be delivered: see s 196(3), (4). The recorded delivery service may be used as an alternative to registered post: see the Recorded Delivery Service Act 1962 s 1(1).

UPDATE

204 Severance of joint tenancies by notice

NOTE 1--A joint tenancy in equity can be severed by will, see, for example *Carr v Isard* [2006] EWHC 2095 (Ch), [2007] WTLR 409 (no severance of joint tenancy on the facts).

NOTE 3--In 1925 Act s 196(4) (amended by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149) for 'through the post office' read 'by the postal services operator concerned'. For the meaning of 'postal operator' see the Postal Services Act 2000 s 125(1); and POST OFFICE vol 36(2) (Reissue) PARA 10B.

If a notice can be shown to have been left at the last-known abode of the addressee, then that constitutes good service, even if the addressee did not actually receive it: *Kinch v Bullard* [1998] 4 All ER 650. When a conveyance requires that any notice of severance is endorsed on it, in order to allow subsequent purchasers of the property to obtain good title, failure to endorse the notice on the conveyance at the time of service does not prevent it taking effect between the co-owners: *Grindal v Hooper* [1999] EG 150 (CS).

Matrimonial Causes Act 1973 s 24 (as originally enacted) amended: see PARA 67 NOTE 3.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(iii) Severance of Joint Tenancies/205. Severance of joint tenancies by homicide.

205. Severance of joint tenancies by homicide.

If one joint tenant is guilty of the other's death, there is a severance of the joint tenancy so as to prevent the killer from taking any beneficial interest by survivorship[1].

1 *Re K* [1985] Ch 85, [1985] 1 All ER 403; affd [1986] Ch 180, [1985] 2 All ER 833, CA. The severance is subject to any relief granted by the court under the Forfeiture Act 1982. It follows from the rule of public policy, known as the forfeiture rule, that a person guilty of another's death may not take a benefit which would otherwise accrue from the death. As to the forfeiture rule, and the court's power to modify it under the Forfeiture Act 1982, see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 81; and WILLS vol 50 (2005 Reissue) PARA 342.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(2) JOINT TENANCY/(iii) Severance of Joint Tenancies/206. Severance of joint tenancies; conveyancing machinery.

206. Severance of joint tenancies; conveyancing machinery.

When the entire interest in the property, both legal and equitable, is vested in the sole survivor of joint tenants, the beneficial interest merges in the legal estate and the previously existing trust comes to an end[1]. The sole survivor may then deal with his legal estate as if it were not held in trust[2] and, in favour of a purchaser of the legal estate, the survivor is deemed to be solely and beneficially interested if the conveyance includes a statement that he is so interested[3]. This provision in favour of a purchaser does not apply if, before the date of the conveyance by the survivor (1) a memorandum of severance, that is a note or memorandum signed by the joint tenants or one of them and recording that the joint tenancy was severed in equity on a specified date, was indorsed on or annexed to the conveyance by virtue of which the legal estate was vested in the joint tenants[4]; or (2) a bankruptcy order made against any of the joint tenants, or a petition for such an order[5], was registered under the Land Charges Act 1972 (replacing, in this respect, the Land Charges Act 1925), being an order or petition of which the purchaser has notice, by virtue of the registration, on the date of the conveyance by the survivor[6]. Nor does this provision in favour of a purchaser apply to registered land[7].

1 *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231.

2 See the Law of Property Act 1925 s 36(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 4).

3 Law of Property (Joint Tenants) Act 1964 s 1(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), (2), Sch 1 para 3, Sch 2). The same applies, subject to the necessary modifications, to a conveyance by the personal representatives of the survivor: see the Law of Property (Joint Tenants) Act 1964 s 1(2). The 1964 Act is retrospective in that s 1 (as amended) is deemed to have come into force on 1 January 1926, and for the purposes of s 1 (as amended) in its application to a conveyance executed before 31 July 1964, a statement signed by the vendor or his personal representatives that he was solely and beneficially interested is to be treated as if it had been included in the conveyance: s 2. The purpose of the Act was to cure a supposed defect in the conveyancing machinery, namely that, before the Act, a purchaser could not tell whether the joint tenancy had remained a joint tenancy without investigating the beneficial interests.

4 Ibid s 1(1) proviso (a).

5 As to bankruptcy petitions and orders see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 124 et seq, 195 et seq.

6 Law of Property (Joint Tenants) Act 1964 s 1(1) proviso (b) (amended by the Insolvency Act 1985 s 235, Sch 8 para 13). As to the registration of petitions in bankruptcy in the register of pending actions, the registration of bankruptcy orders in the register of writs and orders affecting land, the effect of such registration and the protection afforded by a search of the register, see LAND CHARGES.

7 See the Law of Property (Joint Tenants) Act 1964 s 3. As to the position where the land is registered see LAND REGISTRATION. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

UPDATE

206 Severance of joint tenancies; conveyancing machinery

NOTE 7--Law of Property (Joint Tenants) Act 1964 s 3 amended by the Land Registration Act 2002 Sch 11 para 5.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(i) How Tenancies in Common Arise/207. Tenancy in common now only in equity.

(3) TENANCY IN COMMON

(i) How Tenancies in Common Arise

207. Tenancy in common now only in equity.

Before 1926 a tenancy in common in land might exist either at law or in equity. Under such a tenancy the land was said to be held in undivided shares[1], and the tenancy differed from a joint tenancy in that it required neither unity of title, interest nor time, but only unity of possession[2]. Under the Law of Property Act 1925 a legal estate is not capable of subsisting or being created in an undivided share in land[3], and it can only be created so as to take effect behind a trust of land[4].

1 Land held in coparcenary was also said to be held in undivided shares: Co Litt 164a. As to coparcenary see PARAS 224-226 post.

2 See Littleton's Tenures s 292; Co Litt 189a; 2 Bl Com (14th Edn) 191; Challis's Law of Real Property (3rd Edn) 368 et seq.

3 See the Law of Property Act 1925 s 1(6); and PARA 53 note 7 ante. An easement, right or privilege over or in relation to land may, however, still be held for a legal estate by tenants in common: s 187(2). As to ownership of a party wall see PARA 62 ante; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 961 et seq. For the meaning of 'legal estate' see PARA 47 ante.

4 See ibid s 34(1), which provides that an undivided share in land is not capable of being created except as provided by s 34 (as amended) or by the Settled Land Act 1925. By the Settled Land Act 1925 s 36(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(1), (11)), an undivided share in land is not capable of being created except under a trust instrument, or under the Law of Property Act 1925, and then only takes effect behind a trust of land. Thus both enactments contemplate that undivided shares, in addition to arising under a trust instrument, may arise as provided by the Law of Property Act 1925. Such provision is made by s 34(2), (3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 3), under which after 1925 dispositions purporting to create undivided shares result in the land being held in trust for the persons interested in it. These trusts are known as 'trusts of land': Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(a). See further PARA 211 post.

Prior to 1 January 1997, under the Law of Property Act 1925 an undivided share in land could only be created so as to take effect behind a trust for sale: that is, the owner of the undivided share had no estate in the land

itself, but he had an interest in the proceeds of sale of the land and in the income of the land until sale. However, for some purposes his interest was treated as an interest in the land: see PARA 77 note 7 ante; and see further PARA 55 note 2 ante. Where such trusts for sale were imposed by statute they have now, by the amendments introduced by the Trusts of Land and Appointment of Trustees Act 1996, been replaced by trusts of land, as outlined supra, so that the owner of each undivided share will now have an interest in land. Where they were imposed expressly by the trust instrument, unless the trust was created by the will of a testator who died prior to 1 January 1997, the existence of the duty to sell no longer means that the land is to be regarded as personal property: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and PARA 77 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(i) How Tenancies in Common Arise/208. Creation of tenancy in common by severance of joint tenancy.

208. Creation of tenancy in common by severance of joint tenancy.

A tenancy in common was formerly created by a severance of a joint tenancy which left the unity of possession untouched[1], but no severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, is now permissible, whether by operation of law or otherwise[2]. However, this does not affect the right to sever a joint tenancy in an equitable interest, whether or not the legal estate is vested in the joint tenants[3].

1 Ie where there was no partition of the property: see Littleton's Tenures s 292.

2 See the Law of Property Act 1925 s 36(2) (as amended); and PARA 198 ante. For the meaning of 'legal estate' see PARA 47 ante.

3 Ibid s 36(2). As to the severance of a joint tenancy see PARA 198 et seq ante. For the meaning of 'equitable interest' see PARA 46 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(i) How Tenancies in Common Arise/209. Creation of tenancy in common by grant or devise.

209. Creation of tenancy in common by grant or devise.

A tenancy in common in equity can be created by express limitation by the same words of severance as would have created a legal tenancy in common at common law. At common law there might be a grant or devise of the land in undivided shares. This might arise where, for example, land was granted to two persons to hold, the one moiety to one in fee simple or for some other estate, and the other moiety to the other, whether for the same or a different estate[1]; or without expressly giving the land in moieties, it was sufficient to use words signifying that the grantees were to take equally between them[2], or to them and their respective heirs[3]. If no words of severance were used, the grantees took as joint tenants at law, although a court of equity might in special cases declare a tenancy in common in equity[4].

1 Littleton's Tenures s 298.

2 4 Cru Dig (32 Deed c 22 s 58); *Fisher v Wigg* (1700) 1 P Wms 14; *Hamell v Hunt* (1701) Prec Ch 163; *Rigden v Vallier* (1751) 2 Ves Sen 252; *Goodtitle d Hood v Stokes* (1752) 1 Wils 341. See also *Bois v Roswell and Dickins* (1667) 1 Lev 232; *Anon* (1684) 2 Vent 365. As to what words will suffice to create a tenancy in common see further WILLS vol (2005 Reissue) PARA 679.

3 *Fleming v Fleming* (1855) 5 I Ch R 129, a case of an annuity charged on land where the authorities are fully discussed. In a grant to two persons jointly and severally, the word 'severally' was void, and they were joint tenants: *Slingsby's Case* (1587) 5 Co Rep 18b at 19a. The contrary construction was given to a similar gift contained in a will: see *Perkins v Baynton* (1781) 1 Bro CC 118. As to the effect of the words 'as beneficial joint tenants in common in equal shares' see *Martin v Martin* (1987) 54 P & CR 238; cf *Joyce v Barker Bros (Builders) Ltd* (1980) 40 P & CR 512. A conveyance of land to two persons in moieties created a tenancy in common between them (Co Litt 199b), and a grant of a moiety created a tenancy in common between the grantor and grantee (Co Litt 190b).

4 As to such special cases see PARA 191 text and note 8 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(i) How Tenancies in Common Arise/210. Vesting of shares at different times.

210. Vesting of shares at different times.

A tenancy in common arose where there was a limitation which in form created a joint tenancy, but under which the ultimate estates would vest at different times. Thus a tenancy in common arose under the ultimate limitation in a grant to two persons who were not capable of marriage and the heirs of their bodies. The two grantees were joint tenants for life, but the titles of the heirs vested at different times, and they took as tenants in common in tail[1]; and when, without such prior life estate, the limitation was to the heirs of two living persons, the heirs had contingent remainders as tenants in common, since their estates would not vest at the same time[2].

1 Littleton's Tenures s 283; *Hales v Risley* (1673) Poll 369 at 373; 2 Preston's Abstracts of Title 76.

2 *Windham's Case* (1589) 5 Co Rep 7a at 8a; Challis's Law of Real Property (3rd Edn) 369. In a limitation to the right heirs of husband and wife, the heir to both, ie a child, took, and, if no preceding estate was given to the husband and wife, he took as purchaser (*Roe d Nightingale v Quarterly* (1787) 1 Term Rep 630), but such a limitation in a will might be construed to give an estate tail (*Wright v Vernon* (1854) 2 Drew 439; affd sub nom *Vernon v Wright* (1858) 7 HL Cas 35). There might also be tenants in common by prescription (Littleton's Tenures s 310), ie in property a title to which could be gained by prescription. In regard to land, title is not gained positively by prescription, but negatively by the lapse of time. As to the acquisition of such a title in joint tenancy see PARA 191 ante; and LIMITATION PERIODS vol 68 (2008) PARA 1100.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(i) How Tenancies in Common Arise/211. Creation of tenancy in common behind trust of land.

211. Creation of tenancy in common behind trust of land.

Limitations corresponding to those already discussed[1] may still be used to create equitable undivided shares in land. Undivided shares taking effect in this way behind a trust of land can be created either by way of trust or by purported grant or devise to the grantees or devisees in undivided shares[2]. When land is expressed to be conveyed to any persons in undivided shares and those persons are of full age[3], the conveyance operates to vest the land in the grantees, or, if there are more than four grantees, in the four first named in the conveyance, in trust for the persons interested in the land[4]; and a devise to two or more persons in undivided shares operates as a devise to the testator's personal representatives[5] and in trust for the persons interested in the land[6].

1 See PARAS 209-210 ante. The limitations will be varied so as to conform to the rule that, whereas an heir can take by purchase, he cannot take by inheritance: see PARA 96 note 9 ante.

2 See the Law of Property Act 1925 s 34(1), (2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 3); the Settled Land Act 1925 s 36(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(1), (11)).

3 A person attains full age on attaining the age of 18: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

4 Law of Property Act 1925 s 34(2) (as amended: see note 2 supra). As to the meaning of the references to persons interested in the land see note 6 infra.

5 However, this is without prejudice to their rights and powers for the purposes of administration: see ibid s 34(3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 3).

6 Law of Property Act 1925 s 34(3) (as amended: see note 5 supra); *Re House, Westminster Bank v Everett* [1929] 2 Ch 166. For these purposes, references to the persons interested in the land include persons interested as trustees or personal representatives (as well as persons beneficially interested): Law of Property Act 1925 s 34(3A) (added by the Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 3(4)).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(ii) Incidents of Tenancy in Common/212. Nature of tenancy in common before 1925.

(ii) Incidents of Tenancy in Common

212. Nature of tenancy in common before 1925.

In as much as tenants in common were not required to have unity of title, they have several freeholds, whereas joint tenants had one freehold[1]; and in as much as they were not required to have unity of interest, they might be entitled to the land in unequal shares, and for estates which were unequal in duration. Thus, the land might be limited in unequal shares on the creation of the tenancy, or, after limitations in equal shares, inequality might arise from several of these shares becoming vested in one of the tenants in common[2]; and, although the entire fee in each share had to be disposed of either in possession, remainder or reversion, the different shares might be subject to different limitations[3]. The separation of interests excluded the right of survivorship, and, on the death of one tenant in common, his share passed according to its own limitation[4].

Tenancy in common resembled joint tenancy in matters depending on unity of possession. The occupation was undivided, and neither owner could claim a separate part save by obtaining partition[5]. One tenant in common who received more than his share of the rents and profits was liable to account to the others[6], and a tenant in common would be restrained by injunction from destructive waste[7].

1 Co Litt 189a; 2 Preston's Abstracts of Title 75. As to the four unities of title, interest, possession and time see PARA 193 ante.

2 See Challis's Law of Real Property (3rd Edn) 370.

3 This followed from the consideration that each share was a separate freehold: Challis's Law of Real Property (3rd Edn) 370. Accordingly, it could be limited in any way possible for a freehold independently of the other shares. As to limitations of cross-remainders in undivided shares see Challis's Law of Real Property (3rd Edn) 370-373.

4 2 Bl Com (14th Edn) 194.

5 Thus if one tenant in common ousted the other he was guilty of trespass: see *Jacobs v Seward* (1872) LR 5 HL 464, HL. As to partition see PARA 215 et seq post.

6 There was the same statutory liability to account as in the case of joint tenants: see PARA 196 ante.

7 *Hole v Thomas* (1802) 7 Ves 589; *Arthur v Lamb* (1865) 2 Drew & Sm 428; *Bailey v Hobson* (1869) 5 Ch App 180. As to waste see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 431 et seq; SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(ii) Incidents of Tenancy in Common/213. Nature of tenancy in common since 1925.

213. Nature of tenancy in common since 1925.

As a tenancy in common now takes effect behind a trust[1], the legal right to possession of the land, or the receipt of the rents and profits, is in the trustees of the entirety, who are liable to account and to see to the preservation of the property under the law applicable to trustees generally[2]. Otherwise, the principles previously mentioned[3] apply. The tenants in common have several interests, whereas joint tenants, whether at law or in equity, have one interest; the tenants in common may be entitled to equitable shares in the land in unequal shares and for interests which may be unequal in duration; and, although the absolute interest in each share must be disposed of either in possession or reversion, the different shares may be subject to different limitations and the limitations may include entailed interests[4]. There is no right of survivorship, and on the death of a tenant in common his share passes according to its own limitation[5].

1 As to a tenancy in common existing only in equity see PARA 207 ante.

2 See TRUSTS vol 48 (2007 Reissue) PARA 947 et seq. As to the right of beneficiaries to occupy the land and restrictions on that right see the Trusts of Land and Appointment of Trustees Act 1996 ss 12, 13; and PARA 68 ante. If one tenant in common grants a licence, the other may terminate it: *Robson-Paul v Farrugia* (1969) 113 Sol Jo 346, CA.

Prior to the bringing into force of the Trusts of Land and Appointment of Trustees Act 1996 ss 12, 13 on 1 January 1997, the position was probably that a tenant in common was entitled, by reason of his beneficial interest, to occupy the land: see *Bull v Bull* [1955] 1 QB 234, [1955] 1 All ER 253, CA; *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 507, [1980] 2 All ER 408 at 414-415, HL, per Lord Wilberforce and at 510 and 416-417 per Lord Scarman; *City of London Building Society v Flegg* [1988] AC 54 at 71-72, [1987] 3 All ER 435 at 439, HL, per Lord Templeman; *Dennis v MacDonald* [1982] Fam 63, [1982] 1 All ER 590, CA; *Kemmis v Kemmis* [1988] 1 WLR 1307, CA; but cf *Jones v Challenger* [1961] 1 QB 176 at 184, [1960] 1 All ER 785 at 789, CA, per Devlin LJ; *Barclay v Barclay* [1970] 2 QB 677, [1970] 2 All ER 676, CA; and see *City of London Building Society v Flegg* supra at 81 and 446 per Lord Oliver. In general, a tenant in common not in occupation could not claim rent from a tenant in common in occupation: *Jones (AE) v Jones (FW)* [1977] 2 All ER 231, [1977] 1 WLR 438, CA; *Chokkar v Chokkar* [1984] FLR 313, CA. As to when payment of an occupation rent would be ordered see PARA 197 notes 5-6 ante.

3 See in particular para 212 ante.

4 No new entailed interests can now be created, either in real or personal property, but this does not effect any entailed interests created before 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 ss 2(6), 25(4), Sch 1 para 5; and PARAS 105, 119 ante.

5 As to the right of survivorship in the case of joint tenants see PARA 195 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/214. Determination by union of interests in one person.

(iii) Determination of Tenancies in Common

214. Determination by union of interests in one person.

A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land[1].

1 This will now be a union of all the beneficial interests, and the sole beneficial owner will require to obtain from the trustees of the entirety a conveyance of the land.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/215. Determination by partition.

215. Determination by partition.

A tenancy in common may be determined by partition. The legal term 'partition'[1] is applied to the division of land, tenements and hereditaments belonging to co-owners[2] and the allotment among them of the parts[3] so as to put an end to community of ownership between some or all of them[4].

1 Besides this meaning of 'partition', the term was at one time applied to the severance of a joint tenancy (see Co Litt 167b, and Hargrave's note), and to the agreements for alternate enjoyment of property referred to in Co Litt 164b, 165a. See also EQUITY vol 16(2) (Reissue) PARA 467. As to joint tenancy and its severance see PARA 190 et seq ante.

2 The co-owners may be joint tenants, tenants in common or coparceners. They must be co-owners in one of these senses, and not owners of separate parts the boundaries between which have been lost: see *O'Hara v Strange* (1847) 11 I Eq R 262. In the latter instance the proper course is some method of ascertaining boundaries: see BOUNDARIES vol 4(1) (2002 Reissue) PARA 903 et seq.

3 Thus, if three persons are co-owners, tenants in fee simple, of Blackacre, Whiteacre and Greenacre, the transaction by which one of them becomes sole owner in fee simple of Blackacre, another of Whiteacre and the third of Greenacre is a partition.

4 Thus, in the example given in note 3 supra, a transaction by which one person becomes sole owner of Blackacre, while the other two remain co-owners of Whiteacre and Greenacre, is a good partition. This can only be by agreement of those persons between whom a community of ownership is left subsisting.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/216. Modes of effecting partition of tenancies in common; in general.

216. Modes of effecting partition of tenancies in common; in general.

Land belonging to co-owners may be partitioned by agreement if all the parties are sui juris or have power conferred on them by law or by act of a predecessor in title[1]. In default of agreement any co-owner could, before 1926, commence a partition action and the court could order a partition or could order a sale of the land in lieu of partition[2]. Alternatively, before 1926, an order for partition could in certain cases be obtained from the (then) Minister of Agriculture and Fisheries[3]. However, the imposition by the 1925 property legislation of a trust in all cases of co-ownership led to a complete alteration of the law relating to partition in default of agreement. The enactments[4] which gave the Chancery Division jurisdiction to order compulsory sale and division of the proceeds of sale in lieu of partition were repealed[5]; instead, a power to partition the land is vested in the trustees, and, if this power is inadequate in any particular case, additional powers may be conferred upon them by the court[6]. Partition actions have accordingly been rendered unnecessary and obsolete[7], but a brief account of the earlier law is given in order that transactions with regard to previous tenancies in common may be understood[8].

Prior to 1868, the law produced numerous inconveniences and absurdities[9] and led to the passing of the Partition Act 1868 and the Partition Act 1876 (both now repealed), under which the court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition[10]. Under these enactments, if any party, whatever might be the amount of his interest, requested a sale[11] and distribution of the proceeds[12], the court might in its discretion order a sale notwithstanding the dissent or disability of any other party, if it appeared to the court that it would be more beneficial for the parties interested (1) by reason of the nature of the property to which the action related; or (2) by reason of the number of the parties interested or presumptively interested; or (3) by reason of the absence or disability of some of the parties; or (4) by reason of any other circumstances[13]. Generally, in determining whether a sale was more beneficial than a partition, the court considered only the pecuniary results[14], disregarding matters of sentiment, and had regard to the interest of all parties interested as a whole[15]; but it could and would order a sale where, in its discretion, it thought fit, unless the parties opposing a sale undertook to purchase the shares of those desiring sale[16].

By the Inclosure Act 1845[17], power to make partition orders was conferred upon the Inclosure Commissioners for England and Wales, and this power ultimately devolved upon the (then) Minister of Agriculture and Fisheries[18]. However, resort was seldom had to the power[19], and it is considered that it was impliedly repealed or destroyed by the provisions of the Law of Property Act 1925 imposing a trust in all cases of co-ownership; but while operative it enabled the minister to make an order of partition of any land[20] vested in persons interested in undivided shares or as joint tenants, coparceners, or tenants in common upon their request in writing[21], the costs being borne by the persons interested who applied for partition in such proportions as might be ordered[22]. Land allotted on partition was to be held for the same estates, uses and trusts as the undivided shares were held[23], and was made subject to the same tenures, customs and services[24]. An order might be made on the application of the owners of two-thirds in value of the property, or, in the case of a partition under an inclosure award, on the application of any party interested, notwithstanding the opposition of the other parties interested[25]; and the minister might also confirm a partition agreed upon but not completed, if the parties were in possession under such agreement[26].

1 As to property which may be partitioned see PARA 218 post.

2 As to partition actions generally see note 8 infra.

3 As to partition by order of a minister see the text and notes 17-26 infra. Partition by means of a private Act of Parliament was sometimes obtained in cases where other methods were not available: see eg the De Trafford Estate Act 1904.

4 Ie the Partition Act 1868 and the Partition Act 1876, both of which were repealed by the Law of Property Act 1925 s 207, Sch 7 (repealed).

5 See note 4 supra. Where a partition action was pending at the commencement of the Law of Property Act 1925 (ie 1 January 1926), and an order for partition or sale was made before 1 July 1927, the transitional provisions imposing a statutory trust did not apply: see s 39(4) (as originally enacted), Sch 1 Pt IV para 1(10) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule).

6 As to the statutory powers of trustees and of the court to partition land see PARA 223 post.

7 See *Re Warren, Warren v Warren* [1932] 1 Ch 42 at 47; *Bull v Bull* [1955] 1 QB 234 at 237, [1955] 1 All ER 253 at 255, CA.

8 By the common law, in the absence of agreement between the parties interested either as joint tenants or as tenants in common, the only method by which partition could be compelled was by the writ de partitione facienda: Fitz Nat Brev 62. According to Littleton, the writ was the origin of the name 'coparceners': see Littleton's Tenures s 241; Co Litt 164b. In his note to Co Litt 169a, Hargrave mentions two other writs of livery and partition applicable to lands holden in capite descended to coparceners. As to the development of partition actions see generally *Patel v Premabhai* [1954] AC 35, PC. The writ was confined at first to freehold hereditaments held in coparcenary: Co Litt 167a. This remedy was extended in 1539 by 31 Hen 8 c 1 (Joint Tenants and Tenants in Common) (1539) (repealed) to the case of all joint tenants and tenants in common in their own right or in the right of their wives, and in 1540 by 32 Hen 8 c 32 (Joint Tenants for Life or Years) (1540) (repealed) to the case of joint tenants and tenants in common for a term of life or years, and where one of the joint tenants in common held for life or for years. The writ of partition was a cumbersome and difficult process: see *Agar v Fairfax, Agar v Holdsworth* (1811) 17 Ves 533 at 553; 1 Fonblanque's Treatise of Equity (5th Edn) 18; and Allnatt's Law of Partition 48 et seq. For the procedure see Co Litt 167b-168a; *Patel v Premabhai* [1954] AC 35 at 45-47, PC. After some attempt to simplify the process in 1696 by 8 & 9 Will 3 c 31 (Partition) (1696) (repealed), the writ was abolished in 1833 by the Real Property Limitation Act 1833 s 36 (repealed).

Owing to the extreme difficulty attending the process of partition at common law, especially where the title was complicated and where discovery was necessary, the Court of Chancery assumed jurisdiction at a very early period to decree partition in proceedings instituted by bill: see *Norse v Ludlow* (1590) Toth 155; *Long v Miller* (1594) Toth 155; *Mundy v Mundy* (1793) 2 Ves 122 at 124. See also Selden Society vol X, 129, where there is recorded a petition, in 1432-43, to Stafford, Chancellor of England, asking for partition in a case where no remedy at law was available. For further cases of even earlier date see 1 Mayn 133; YB 15 Edw 3, Pasch pl 42 (Rolls Series at 103); and YB 16 Edw 3, Hil pl 44 (Rolls Series I at 132). See generally EQUITY vol 16(2) (Reissue) PARA 467. The important distinction between the common law judgment and the decree in equity was that whereas the common law judgment vested the legal estate, the decree in equity had no such effect, but directed the parties themselves to execute the conveyances necessary to pass the legal estate. Although the Court of Chancery would decree specific performance of an agreement to partition copyholds (*Bolton v Ward* (1845) 4 Hare 530), or direct a partition of freeholds and copyholds so as to give the entire copyholds to one party (*Dodson v Dodson* (1795) Allnatt's Law of Partition 94; *Dillon v Coppin* (1833) 6 Beav 217n; *Bowles v Rump* (1861) 9 WR 370), yet it had no jurisdiction prior to 1841 (see the Copyhold Act 1841 s 85 (repealed)) to direct a partition of copyholds or customary freeholds (*Jope v Morshead* (1843) 6 Beav 213 at 217). Prior to the Partition Act 1868 (repealed), partition was a matter of right, and the court had no discretion to refuse partition or to order sale in lieu thereof: *Warner v Baynes* (1750) Amb 589; *Parker v Gerard* (1754) Amb 236. In partition an account of rents and profits might be decreed against a co-owner who had been in possession of the whole or of more than his share: *Lorimer v Lorimer* (1820) 5 Madd 363; *Hill v Fulbrook* (1822) Jac 574 at 575; *Hill v Hickin* [1897] 2 Ch 579 at 581. But a tenant in common in occupation of the entirety was not chargeable with an occupation rent (*M'Mahon v Burchell* (1846) 5 Hare 322 (on appeal 2 Ph 127); *Jones v Jones* [1977] 1 WLR 438, CA) unless he had excluded the others (*Pascoe v Swan* (1859) 27 Beav 508; *Re Pavlou (A Bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046; *Dennis v McDonald* [1981] 2 All ER 632, [1981] 1 WLR 810; on appeal [1982] Fam 63, [1982] 1 All ER 590, CA; *Porter v Lopes* (1877) 7 ChD 358). See further PARA 197 note 5 ante. Such a co-owner, on the other hand, might be entitled to a lien for money expended on improvements: *Swan v Swan* (1819) 8 Price 518; *Re Leslie, Leslie v French* (1883) 23 ChD 552 at 564; *Leigh v Dickeson* (1884) 15 QBD 60, CA; *Hill v Hickin* supra. However, in the case of a tenant in common in possession of more than his share, there would be no allowance for improvements unless he was charged with an occupation rent: *Teasdale v Sanderson* (1864) 33 Beav 534; *Re Jones, Farrington v Forrester* [1893] 2 Ch 461 at 477-479. See further PARA 197 note 3 ante.

9 In *Turner v Morgan* (1803) 8 Ves 143, Lord Eldon LC decreed partition of a single house, and in argument a case was cited of a house which was partitioned by actually building a wall up the middle.

10 See the Partition Act 1868 s 3 (repealed); and the Partition Act 1876 s 7 (repealed). The Law of Property Act 1925 s 30 (now repealed; replaced by the Trusts of Land and Appointment of Trustees Act 1996 s 14: see PARA 67 ante) was the successor to the Partition Acts and, in particular, to the power of sale granted under the Partition Act 1868: *Dennis v McDonald* [1981] 2 All ER 632, [1981] 1 WLR 810 (order varied on appeal [1982] Fam 63, [1982] 1 All ER 590, CA). As to the powers conferred on the court by the Trusts of Land and Appointment of Trustees Act 1996 s 14 see further PARA 67 ante.

11 *Re Langdale's Estate* (1871) 5 IR Eq 572.

12 *Re Dyer, Dyer v Paynter* (1885) 54 LJ Ch 1133, CA.

13 See the Partition Act 1868 s 3 (repealed). The burden of showing good reason under s 3 (repealed) rested on those applying for a sale: *Evans v Evans, Evans v Jones* (1883) 52 LJ Ch 304; cf the Partition Act 1868 s 4 (repealed). In any action in which the court had jurisdiction to order partition, if the party or parties individually or collectively interested to the extent of a moiety or upwards in the property to which the action related requested a sale, a sale and distribution of the proceeds was to be ordered in lieu of partition unless the court saw good reason to the contrary: s 4 (repealed). The burden of showing good reason rested on those opposing a sale: *Lys v Lys* (1868) LR 7 Eq 126.

14 *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 533.

15 *Allen v Allen* (1873) 42 LJ Ch 839; *Fleming v Crouch* [1884] WN 111. In *Huddersfield Corpn v Jacomb* [1874] WN 80, the plaintiff being a corporation which had acquired the land for public purposes, it was said that the public interest had to be considered. Sale could be ordered, even though forbidden by the will under which the parties claimed: *Thompson v Richardson* (1872) 6 IR Eq 596.

16 See the Partition Act 1868 s 5 (repealed).

17 As to the scope of the Inclosure Acts 1845-1899 see COMMONS vol 13 (2009) PARA 418 et seq.

18 See the Inclosure Act 1845 s 90 (amended by the Statute Law Revision Act 1891). As to the devolution of the powers of the Inclosure Commissioners see COMMONS vol 13 (2009) PARA 423.

19 This was partly because the power to award money for equality of exchange was very limited: see the Inclosure Act 1857 ss 7, 8 (both repealed); and PARA 242 post. Moreover orders in exercise of the power did not determine any question of title; and unless the applicants for partition were persons entitled to apply the minister had no jurisdiction and in that case a partition made conferred no title: *Jacomb v Turner* [1892] 1 QB 47 at 51.

20 The Inclosure Act 1845 s 90 (as amended: see note 18 supra) was confined to land to be inclosed under that Act. The Inclosure Act 1848 extended the powers of the Inclosure Commissioners as regards partition to land not subject to be inclosed under the earlier Act, and to land liable to be so inclosed as to which no proceedings for inclosure were pending: see s 13 (amended by the Statute Law Revision Act 1891). The Inclosure Act 1854 extended all the provisions of the previous Acts as regards partition to land subject to be inclosed under the Acts as to which proceedings for inclosure were pending (see s 1), extended the meaning of the word 'land' to incorporeal hereditaments (see s 3), and extended the range of persons who could apply for partition under the Acts (see ss 4, 5). The Commons Act 1876 s 33 made the Inclosure Act 1845 s 105 (as so amended) (see COMMONS vol 13 (2009) PARA 422), applicable to partition orders carried out by separate orders and not included in an inclosure award.

21 See the Inclosure Act 1845 s 90 (as amended: see note 18 supra).

22 See ibid s 91 (ss 91, 93, 94 amended by the Statute Law Revision Act 1891).

23 See the Inclosure Act 1845 s 93 (as amended: see note 22 supra).

24 See ibid s 94 (as amended: see note 22 supra).

25 See the Inclosure Act 1849 s 7 (amended by the Statute Law Revision Act 1891); the Inclosure Act 1859 s 11; *Doe d Knight v Spencer* (1848) 2 Exch 752 at 767 (a case under the Inclosure (Consolidation) Act 1801 (repealed)).

26 See the Inclosure Act 1845 s 5 (repealed).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/217. Partition by agreement; general principles.

217. Partition by agreement; general principles.

Partition by agreement has long been possible at common law[1], and, although the beneficial rights of co-owners now take effect in equity behind a trust of land, it would seem that they have the same right to partition the land by agreement as legal co-owners had before 1926, save only for such differences as are necessarily consequent on their interests being equitable and not legal[2].

1 As to partition by agreement see PARA 218 et seq post.

2 See *Bull v Bull* [1955] 1 QB 234, [1955] 1 All ER 253, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/218. Property which may be partitioned.

218. Property which may be partitioned.

Land of any tenure[1], and all kinds of corporeal hereditaments and any estate in them, may be partitioned by agreement. Incorporeal hereditaments in respect of which before 1926 one of several owners had remedies to enforce his rights independently of the others may be partitioned by agreement, for example rentcharges[2]. So easements, where the tenement in respect of which they are enjoyed is partitioned, may usually be exercised by the separate owners[3]. Other incorporeal hereditaments cannot be partitioned[4]. The co-owners of such hereditaments may agree to exercise their rights in turns[5], or in any other manner to secure equality[6], but the only way to terminate the co-ownership is for one owner to purchase the rights of the other co-owners[7].

1 Leaseholds may be thus partitioned even where the court would refuse to make partition: *North v Guinan* (1829) Beat 342. The exceptions, under this head, of castles for the defence of the realm and villeins (Co Litt 164b, 165a), and land held for services abroad (Bracton's Note Book pl 703) are of mere antiquarian interest.

2 Co Litt 164b. Before 1926 the land was subject to separate distresses for each part of the rent: see *Rivis v Watson* (1839) 5 M & W 255; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 870. Since 1925 there will be only a single right to distrain, exercisable by the trustees in whom the rentcharge is vested, but it seems that partition is still possible.

3 *Newcomen v Coulson* (1877) 5 ChD 133 at 141, CA, per Jessel MR. As against the owner of the servient tenement, the usual rule will apply, that no greater or more extended right can be enjoyed than if the whole remained undivided: see *Menzies v Macdonald* (1856) 2 Jur NS 575, HL. In *Morland v Cook* (1868) LR 6 Eq 252, explained in *Austerberry v Oldham Corpn* (1885) 29 ChD 750 at 774, CA, an obligation to maintain a sea wall was imposed on the owners of aliquot shares of land after partition, and secured by a charge on the shares.

4 Eg profits à prendre of uncertain character, fisheries etc, franchises of ferry, market etc, fealty, the seigniories of manors and inheritances of honour and dignity: Co Litt 164b.

5 Co Litt 165a.

6 Eg by taking equal quantities of the produce: Co Litt 164b, 165a. This was done in *Re Trimmer, Crundwell v Trimmer* (1904) 91 LT 26 (shares in the New River Company).

7 Co Litt 164b-165a.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/219. Parties to the agreement.

219. Parties to the agreement.

Partition may be made by agreement where all the parties are either sui juris or have power conferred on them, either by statute[1] or by any instrument. The parties are such as would be necessary to make an assurance inter vivos of each share of the property[2]. No other interest in the property than that held in common is affected unless the parties have power to determine it[3] or the persons entitled to it concur[4]. An agreement for partition between parties who are sui juris is mutually enforceable by and against the parties and persons deriving title under them by action for specific performance[5]. An executor of a tenant in common has power to concur in a partition[6].

1 Under the Settled Land Act 1882 s 3(iv) (repealed), where the settlement comprised an undivided share in land, or, under the settlement, the settled land had come to be held in undivided shares, the tenant for life could concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition. Section 3(iv) has not been replaced; but as to the power conferred on trustees of land by the Trusts of Land and Appointment of Trustees Act 1996 s 7 (replacing the Law of Property Act 1925 s 28(3) (repealed)) see PARA 223 post.

2 *Anon* (1742) 3 Swan 139n.

3 Thus, to bind the issue in tail, the entail must be effectually barred: *Oakley v Smith* (1759) Amb 368 (sub nom *Oakeley v Smith* (1759) 1 Eden 261). As to the method of barring the entail see PARA 122 et seq ante. Although Coke speaks of a partition made by coparceners of lands entailed as binding their issues if it be equal (Co Litt 166a), and Littleton's Tenures s 257 speaks of an allotment of lands of equal yearly value by way of partition between the husbands of coparceners as not being capable of being defeated afterwards (see Co Litt 171a), this must be understood as meaning that the court will not, at the suit of remaindermen, disturb an equal partition, because it cannot make a better. The decisions in *Burton v Jeux* (undated) cited in 2 Vern at 232, and *Rose v Rose* (undated) cited in 2 Vern at 232 would appear to be to this effect. If the statements in Coke and Littleton are to be understood in any wider sense, the decision of Lord Hardwicke LC in *Ireland v Rittle* (1739) 1 Atk 541 is directly contrary; see, however, the note in Co Litt 171a (Butler's Edn). It was on this principle (ie that no better partition could be made) that the court made an order binding the interest of unborn children in an action for partition by a tenant for life or other limited owner: see *Gaskell v Gaskell* (1836) 6 Sim 643; cf *Hobson v Sherwood* (1841) 4 Beav 184.

4 An incumbrancer on the share must concur unless provided for.

5 *Knollys v Alcock* (1800) 5 Ves 648; *Pearson v Lane* (1809) 17 Ves 101; *Heaton v Dearden* (1852) 16 Beav 147; *Paine v Ryder* (1857) 24 Beav 151. The agreement is enforceable even though the court has no jurisdiction to make partition: *Bolton v Ward* (1845) 4 Hare 530; *Paine v Ryder* supra. Where the assurance, although intended as a partition agreement, is ineffectual to bar an entail, those claiming under the entail will not be bound specifically to perform the agreement (*Oakeley v Smith* (1759) Amb 368, sub nom *Oakeley v Smith* (1759) 1 Eden 261), but in the case of an oral agreement for partition, in the nature of a family arrangement, the parties may be compelled to give effect to it by barring the entail (*Neale v Neale* (1837) 1 Keen 672). As to specific performance generally see SPECIFIC PERFORMANCE.

6 *Re Kemnal and Still's Contract* [1923] 1 Ch 293, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/220. Modes of obtaining division.

220. Modes of obtaining division.

The division of the property into parts may be effected either by the co-owners themselves, or by a third person nominated by all[1]. In either case the allotment of the parts among the co-owners may be determined either by the choice of the parties, the award of the third person, or

by lot[2]. Where the division is by a third person nominated for the purpose, he must be impartial and consider the interests of all parties to the partition[3].

1 Littleton's Tenures ss 243, 244.

2 Littleton's Tenures ss 243, 244, 246.

3 Co Litt 166b. This is the ground of the rule that the eldest coparcener, when she is the person chosen to make the partition, must choose last instead of first: see Co Litt 166b. As to coparceny before 1926 see PARA 224 post.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/221. Terms of partition.

221. Terms of partition.

An exception, reservation or grant may be made, whether of easements[1], mines or minerals[2] or other rights not merely dependent on ownership[3]. Compensation for equality of partition may be given in any form agreed upon[4]. If it is a lump sum, the rights and liabilities as to payment devolve as for unpaid purchase money on a sale[5].

1 Cf Bro Abr (1586) tit Particion, pl 7, where it is stated that a deed is not necessary between coparceners.

2 See eg *Darvill v Roper* (1855) 3 Drew 294.

3 *Charlesworth v Gartsed* (1863) 3 New Rep 54 at 55 per Knight Bruce LJ.

4 In *Ireland v Rittle* (1739) 1 Atk 541 the owner of one part agreed to pay the taxes on both parts. A rentcharge is often granted.

5 *Hulbert v Hart* (1682) 1 Vern 133, where compensation was an annuity payable under a bond to the grantee, his executors or administrators; the executor had the benefit of the bond. As to rights and liabilities in respect of purchase money on sale of land generally see SALE OF LAND.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/222. Completion of partition.

222. Completion of partition.

A partition agreement may be made under hand, providing for the method of making partition and for other matters of title and adjustment of rights between parties. Such an agreement will not of itself terminate the trust of land on which the land is held; and it must be completed by a deed or deeds to which the trustees are parties, which may be either a deed of partition or separate conveyances by the trustees to each of the tenants in common of his or her share[1]. In the case of land vested in personal representatives, the agreement may be completed by an assent[2].

1 The liability to pay the costs of completion, as between specific devisees of the land allotted to a deceased tenant in common and his residuary estate, in the absence of direction by him falls on the devisees: *Re Tann, Tann v Tann, Gravatt v Tann* (1) (1869) LR 7 Eq 434.

2 See EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(3) TENANCY IN COMMON/(iii) Determination of Tenancies in Common/223. Statutory powers of trustees and of the court.

223. Statutory powers of trustees and of the court.

The trustees of land[1] may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money[2]. They must give effect to any such partition by conveying the partitioned land in severalty, whether or not subject to any legal mortgage created for raising equality money, either absolutely or in trust, in accordance with the rights of those beneficiaries[3]; but before exercising this power they must obtain the consent of each of those beneficiaries[4]. Where a share in the land is affected by an incumbrance, the trustees may either give effect to it or provide for its discharge from the property allotted to that share as they think fit[5].

Further, any person who is a trustee of land or has an interest in a property subject to a trust of land[6] may make an application to the court for an order[7]. The court may make any such order relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit but may not make any order as to the appointment or removal of trustees[8]. If a partition cannot be carried out under this power, the court may confer the necessary power on the trustees either generally or for the purpose of carrying out a particular proposal[9].

1 For the meaning of 'trustee of land' see PARA 66 note 7 ante.

2 Trusts of Land and Appointment of Trustees Act 1996 s 7(1). If a share in the land is absolutely vested in a minor, s 7(1)-(4) applies as if he were of full age, except that the trustees may act on his behalf and retain land or other property representing his share in trust for him: s 7(5). Section 7 applies in terms only to land held in undivided shares; but in the case of a joint tenancy the power may usually be exercised provided at least one of the joint tenants is of full age, since he can usually give notice of severance as regards his share: see PARA 203 ante.

3 Ibid s 7(2).

4 Ibid s 7(3).

5 Ibid s 7(4).

6 For the meaning of 'trust of land' see PARA 66 ante.

7 Trusts of Land and Appointment of Trustees Act 1996 s 14(1).

8 Ibid s 14(2), (3). As to this power see further PARA 67 ante.

9 See the Trustee Act 1925 s 57(1); *Re Thomas, Thomas v Thompson* [1930] 1 Ch 194. The application to the court may be made by the trustees or by any of them, or by any person beneficially interested under the trust: Trustee Act 1925 s 57(3). See also TRUSTS vol 48 (2007 Reissue) PARA 1061; SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(4) COPARCENARY/224. Coparcenary before 1926.

(4) COPARCENARY

224. Coparcenary before 1926.

Before 1926 land might be held in coparcenary. Coparcenary arose where two or more persons took hereditaments by the same title by descent[1]. This might be at common law or by special custom[2]. Coparcenary arose at common law where upon the death of a man seised in fee or in tail the land descended upon two or more females as heirs general or heirs in tail[3]; it arose by custom where, according to the custom of gavelkind[4], the land descended upon two or more male persons. Such persons were called 'coparceners'; they constituted but one heir to their ancestor; they had a joint seisin, and they had equal rights in the land as regards each other[5]. However, under a devise to the testator's right heirs, if the heirs were coheiresses, they took as joint tenants and not as coparceners[6].

For some purposes coparceners were regarded as having a joint interest among themselves, so that one could convey her share to another by release[7]. However, generally, their rights among themselves resembled those of tenants in common. Each was entitled to an undivided share in the land, and that share could be transferred to another by assignment or devise or release[8]. There was no jus accrescendi (namely a right of survivorship between joint tenants), and on the death of one coparcener her share devolved upon those who claimed under her by devise[9] or by descent[10], or, in the case of an estate tail, under the entail; and the coparcenary then continued between her successors in title and the other coparceners[11].

1 Littleton's Tenures s 254. They were called 'parceners' because they had a common law right to partition: see Littleton's Tenures s 242; and PARA 216 note 8ante.

2 Littleton's Tenures s 241; 2 Bl Com (14th Edn) 187.

3 Littleton's Tenures s 254. See also EXECUTORS AND ADMINISTRATORS.

4 As to the custom of gavelkind see PARA 14 ante.

5 Littleton's Tenures s 241; 2 Preston's Abstracts of Title 69.

6 *Berens v Fellowes* [1887] WN 58; *Owen v Gibbons* [1902] 1 Ch 636, CA. Before the Inheritance Act 1833 the heiresses would, under such a devise, have taken by descent as their better title, and therefore as coheiresses; but under s 3 (as amended) they took as devisees: see PARA 164 ante; and EXECUTORS AND ADMINISTRATORS.

7 Co Litt 9b; 2 Preston's Abstracts of Title 69. See also *Re Greenwood's Trusts* (1884) 27 ChD 359 (coparceners were 'seised jointly' for the purposes of the Trustee Act 1850 s 10 (repealed)).

8 Co Litt 164a.

9 2 Preston's Abstracts of Title 70.

10 *Cooper v France* (1850) 19 LJ Ch 313; *Re Matson, James v Dickinson* [1897] 2 Ch 509.

11 Co Litt 164a.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(4) COPARCENARY/225. Coparcenary since 1925.

225. Coparcenary since 1925.

Descent to coparceners, whether under the general law of descent or by the custom of gavelkind[1], has been abolished[2], and on the death intestate after 1925 of a person seised in fee simple no coparcenary can arise. However, the abolition of the rules of descent does not affect the descent of an entailed interest[3], and coparcenary may still arise where under an entail the land devolves upon female coheirs[4]. Coparcenary may also arise on the death of a person who was mentally disordered and of full age[5] on 1 January 1926 and who dies without recovering his testamentary capacity[6]. The custom of gavelkind has been wholly abolished, so that coparcenary in these two cases will only arise in circumstances where it would have arisen under the general law before 1926[7].

1 As to the former custom of gavelkind see PARA 14 ante.

2 See the Administration of Estates Act 1925 s 45(1)(a); and EXECUTORS AND ADMINISTRATORS.

3 See ibid s 45(2); and EXECUTORS AND ADMINISTRATORS.

4 See the Settled Land Act 1925 s 36(1), (2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(1), (11): but note s 25(4)). No further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARAS 105, 119 ante.

5 A person now attains full age on attaining the age of 18, but at the commencement of the relevant legislation (ie at 1 January 1926) the age of majority was 21: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

6 See the Administration of Estates Act 1925 s 51(2) (as amended); and EXECUTORS AND ADMINISTRATORS.

7 See ibid s 45(1)(a); and EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(4) COPARCENARY/226. Transitional provisions.

226. Transitional provisions.

Since coparceners hold in undivided shares, land held in coparcenary immediately before the commencement of the Law of Property Act 1925[1] became subject to the statutory trusts[2] in the same manner as land held by two or more persons as tenants in common[3]. Since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997[4], such land has been held in trust for the persons interested in the land[5].

1 The date of commencement of the Law of Property Act 1925 was 1 January 1926: s 209(2) (repealed).

2 As to the statutory trusts see PARA 64 note 3 ante.

3 As to undivided shares and the imposition of a trust for sale see PARA 55 ante. As to tenancies in common see generally para 207 et seq ante.

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 27(2).

5 Ibid s 5(1), Sch 2 para 7.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(5) TENANCY BY ENTIRETIES/227. Nature of tenancy by entireties.

(5) TENANCY BY ENTIRETIES

227. Nature of tenancy by entireties.

Where before 1 January 1883[1] land was conveyed to or devolved upon husband and wife during the coverture[2] in such manner that, but for the marriage, they would take as joint tenants[3], they took as tenants by entireties[4]. In as much as they were regarded as one person, each was tenant of the whole and no less (*per tout et non per mie*), and they could not sever the tenancy and have moieties, nor could the husband alone alienate the land[5]. They could join to alienate it by a conveyance binding on the wife, but otherwise the survivor took the whole[6]. The tenancy might exist in freehold estates, whether in fee or in tail or for life, and also in chattels real[7]. A disposition in favour of a husband and wife and a third person was construed upon the footing of a husband and wife being one, and they took only a moiety between them[8]. A tenancy arising in such a case after the commencement of the Married Women's Property Act 1882[9] in favour of husband and wife only was an ordinary joint tenancy[10], but this did not alter the rule that on a disposition in favour of a husband and wife and a third person the husband and wife took only a moiety between them[11], although on the construction of a devise of the will the property might go in third shares[12].

1 Ie before the commencement of the Married Women's Property Act 1882: see s 25 (repealed).

2 See Co Litt 326a; 2 Preston's Abstracts of Title 39.

3 As to joint tenancy see PARA 189 et seq ante, in particular para 189 text and note 4 ante.

4 2 Bl Com (14th Edn) 182; 2 Preston's Abstracts of Title 39. See also *Purefoy v Rogers* (1671) 2 Lev 39; *Back v Andrews* (1690) 2 Vern 120 (conveyance); *Doe d Freestone v Parratt* (1794) 5 Term Rep 652 at 654. This was so even if the land was expressly conveyed to them as joint tenants: *Pollok v Kelly* (1856) 6 ICLR 367.

5 Co Litt 187b, 310a; Littleton's Tenures s 665.

6 *Thornley v Thornley* [1893] 2 Ch 229 at 233; 2 Preston's Abstracts of Title 41.

7 2 Preston's Abstracts of Title 39.

8 Littleton's Tenures s 291; 2 Preston's Abstracts of Title 40.

9 Ie after 1 January 1883: see note 1 supra.

10 *Thornley v Thornley* [1893] 2 Ch 229 at 233.

11 The rule applied both where the will was made before (*Re March, Mander v Harris* (1884) 27 ChD 166, CA) and after (*Re Jupp, Jupp v Buckwell* (1888) 39 ChD 148) the commencement of the Married Women's Property Act 1882 (see note 1 supra).

12 *Re Dixon, Byram v Tull* (1889) 42 ChD 306; *Re Gue, Smith v Gue* (1892) 61 LJ Ch 510; *Re Jeffery, Nussey v Jeffery* [1914] 1 Ch 375.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/5. CO-OWNERSHIP/(5) TENANCY BY ENTIRETIES/228. Conversion of tenancy by entireties into joint tenancy.

228. Conversion of tenancy by entireties into joint tenancy.

Every tenancy by entireties which was existing immediately before the commencement of the Law of Property Act 1925[1], was as from such commencement converted into a joint tenancy[2], and it was provided that a husband and wife should for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after such commencement, be treated as two persons[3].

1 The date of commencement of the Law of Property Act 1925 was 1 January 1926: s 209(2) (repealed).

2 See ibid s 39(6), Sch 1 Pt VI.

3 Ibid s 37.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(1) CAPACITY TO HOLD AND TRANSFER LAND/229. Persons under disability.

6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE

(1) CAPACITY TO HOLD AND TRANSFER LAND

229. Persons under disability.

The powers of certain persons to hold and transfer land are restricted. A minor[1] may not hold a legal estate in land[2]; and, although he may hold an equitable interest[3], he may not in general make a binding disposition of it[4]. Corporations may at common law generally dispose of their land freely[5], but in certain cases their powers of disposition are restricted[6]. The disposition of land by charities is also subject to restrictions[7]. Persons suffering from mental disorder retain the ownership of their land at law and in equity, but their capacity to deal with it is restricted[8]. The powers of disposition of a tenant for life or statutory owner of settled land and of trustees holding land on a trust of land are subject to certain limitations[9]. Aliens[10] and persons convicted of certain crimes[11] were previously subject to disabilities, but these disabilities have now been removed.

1 A person attains full age on attaining the age of 18: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

2 As to the acquisition and holding of property by a minor see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30 et seq.

3 As to acquisition by a minor of property other than legal estates see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 39.

4 As to minors and alienation generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 46 et seq.

5 As to corporations and the alienation of property see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1255 et seq.

6 See eg CORPORATIONS vol 9(2) (2006 Reissue) PARA 1230 et seq (limitation of powers); EDUCATION vol 15(2) (2006 Reissue) PARA 1379 (universities and colleges).

7 See CHARITIES vol 8 (2010) PARA 395 et seq.

8 As to the management of the property and affairs of a mentally disordered person see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

9 See SETTLEMENTS.

10 As to aliens and their property generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

11 As to deprivation of property used by a person for the purpose of a crime see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 390 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(1) CAPACITY TO HOLD AND TRANSFER LAND/230. Married women.

230. Married women.

A married woman is in the same position, as regards the acquisition, holding and disposition of property, as a feme sole[1].

1 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(a). As to the restrictions previously imposed on married women's property see Megarry and Wade's Law of Real Property (5th Edn) 1020-1024.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(1) CAPACITY TO HOLD AND TRANSFER LAND/231. Power of alienation.

231. Power of alienation.

Save where his personal capacity is restricted[1], the owner of a legal estate or an equitable interest has complete power to transfer it by assurance inter vivos[2], and any attempt to restrict his right of alienation is generally void[3]. At common law, no possibility, right, title or thing in action was assignable[4], and contingent remainders and executory interests were treated as possibilities so as to fall within this rule[5]. However, they might be released[6], and a person who purported to convey them might be bound by estoppel[7]. Moreover, assurances and contracts relating to them, if made for valuable consideration, were recognised as effectual in equity[8]. Such future interests, whether remainders or contingent interests, are now equitable interests[9], and statute provides that a contingent, executory or future equitable interest in any land, or a possibility coupled with an interest[10] in any land[11], whether or not the object of the gift or limitation of such interest or possibility be ascertained, may be disposed of[12]. This power extends also to a right of entry into or upon land, whether immediate or future, and whether vested or contingent[13], and to a right of entry for condition broken, provided the right has not been waived[14]. An expectancy or spes successionis is not assignable without consideration, but an assignment for value may be enforceable in equity as a contract[15].

1 As to persons under disability see PARA 229 ante.

2 As to the early history of the power of alienation see PARA 8 ante; and as to alienation by will see WILLS. As to setting aside voidable conveyances see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 663 et seq; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 853 et seq.

3 See GIFTS vol 52 (2009) PARA 254, where the validity of restraints on alienation is fully discussed. As to the recognition paid by the court to limitations which, in this connection, are invalid by English law, although allowed by the *lex loci rei sitae* (ie the law of the place in which a thing in question happens to be) see *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA (life interest to a man in a Scottish heritable bond subject to protection analogous to restraint on anticipation); and see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 380, 399 et seq, 416, 420. A restraint on alienation of an absolute interest should be distinguished from a provision making an interest determinable on alienation. Generally a provision making an interest determinable on alienation is valid: see PARA 146 text and notes 5-6 ante.

4 *Lampet's Case* (1612) 10 Co Rep 46b at 48a. See further CHOSES IN ACTION vol 13 (2009) PARA 14.

5 See *Fulwood's Case* (1591) 4 Co Rep 64b at 66b.

6 *Lampet's Case* (1612) 10 Co Rep 46b at 48b.

7 *Weale v Lower* (1672) Poll 54; *Doe d Brune v Martyn* (1828) 8 B & C 497; *Doe d Christmas v Oliver* (1829) 10 B & C 181. See also ESTOPPEL vol 16(2) (Reissue) PARA 1033.

8 As to assignments permitted in equity see EQUITY vol 16(2) (Reissue) PARA 642.

9 As to equitable interests generally see PARA 46 ante.

10 A mere spes successionis is not within this provision: *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697 at 699. See also the text and note 15 infra.

11 This provision deals with the transfer of existing interests, and not with the creation of new interests: *Savill Bros Ltd v Bethell* [1902] 2 Ch 523 at 540, CA.

12 Law of Property Act 1925 s 4(2)(a).

13 Ibid s 4(2)(b), reproducing the Real Property Act 1845 s 6 (repealed), which was held to apply to a right of entry after dispossession and not to a right of entry for condition broken.

14 See the Law of Property Act 1925 ss 4(3), 141(3). At common law such rights were not assignable, but might be released by deed for the benefit of the terre-tenant (ie he who has the actual possession or occupation of land): see Littleton's Tenures s 347; *Lampet's Case* (1612) 10 Co Rep 46b. A conveyance of land 'subject to' a lease will not operate as a waiver of a right of re-entry already accrued: *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA (overruling *Davenport v Smith* [1921] 2 Ch 270); *Atkin v Rose* [1923] 1 Ch 522. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 615 et seq.

15 As to spes successionis see PARA 183 ante. See also CHOSES IN ACTION vol 13 (2009) PARAS 30-31; EQUITY vol 16(2) (Reissue) PARAS 561-562, 642.

(2) TRANSFER INTER VIVOS

(i) Kinds of Assurance

A. IN GENERAL

232. Assurances at common law and under statute.

Interests in land were formerly conveyed by assurances which took effect at common law, or by statute, or partly at common law and partly by statute. The assurance is now made by deed alone[1], but, formerly, the conveyance by deed of interests involving immediate possession for an estate of freehold was, save in certain special cases[2], accompanied by delivery of possession (that is, in such a case, seisin) although forms of conveyance were used which were intended to avoid actual delivery of possession[3]. Interests in land may also be transferred by Act of Parliament[4] or by court order[5], or, in certain cases, by deed poll executed by the transferee[6].

1 Subject to certain exceptions, all conveyances of land are void for the purpose of conveying or creating a legal estate unless made by deed: Law of Property Act 1925 s 52(1). See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14. The exceptions include leases or tenancies or other assurances not required by law

to be in writing: see s 52(2)(d); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 102. In the Law of Property Act 1925, unless the context otherwise requires, 'conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will: s 205(1)(ii). In the absence of the special context of a particular enactment, the oral creation of a legal estate, eg a tenancy, by parol is not a 'conveyance' within the meaning of s 205(1)(ii): *Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL.

2 Ie release and surrender (see PARA 234 post), exchange (see PARAS 240-242 post), and partition (see PARA 215 et seq ante).

3 As to such forms of conveyance see PARAS 237-238 post, and as to fines and recoveries see PARA 121 ante. Fines were not confined to barring estates tail. They were a bar to all claims at the expiration of five years from the levying of the fine; but, as regards persons under disability, the five years ran from the removal of the disability, and, as regards persons entitled to future estates, ran from the time when their estates fell into possession. Thus they might validate a title under a tenant for life or a disseisor, and, generally, they were used to confirm doubtful titles: see Challis's Law of Real Property (3rd Edn) 393 et seq.

4 See eg the National Health Service Act 1946 s 6 (repealed); the National Health Service Act 1977 s 88 (as amended); and HEALTH SERVICES vol 54 (2008) PARA 4.

5 See eg BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 485-486 (orders under the Insolvency Act 1986 ss 320, 321); COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 876-877 (orders under ss 181, 182); CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304 (orders under the Law of Property Act 1925 s 181 (as amended)); TRUSTS vol 48 (2007 Reissue) PARA 875 et seq (orders under the Trustee Act 1925 ss 44-49).

6 See eg the Lands Clauses Consolidation Act 1845 s 77 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 663; and the Law of Property Act 1925 s 153 (as amended); and PARA 110 ante.

B. ASSURANCES AT COMMON LAW

233. Livery of seisin and feoffment.

At common law an estate of immediate freehold passed by livery of seisin. This form of assurance was known as a 'feoffment'[1]. Livery of seisin is livery in deed or livery in law. Livery in deed involved the actual delivery of vacant possession by the feoffor (or vendor) to the feoffee (or purchaser)[2]. This might be effected by words spoken upon the property, indicating the intention to deliver possession, and either accompanied or not by the delivery of a turf or other article symbolical of the land itself[3]. If a tenant was in possession, and he or any one representing him was on the land, he had to assent to the livery[4]. Livery in law was effected by words spoken in sight of the land, and was turned into livery in deed by the subsequent entry of the feoffee during the life of the feoffor[5].

Livery of seisin was usually, although at common law not necessarily[6], accompanied by a charter of feoffment defining the land assured and the estate taken by the feoffee, and containing a warranty of title by the feoffor[7]. A memorandum of livery of seisin was indorsed on the charter[8]. Under the Statute of Frauds a feoffment could convey no greater estate than a tenancy at will unless evidenced by writing[9], and, under the Real Property Act 1845 (now repealed), a feoffment was void at law unless evidenced by deed, except in the case of a feoffment made under a custom by a minor[10].

At common law any person in possession could by livery of seisin effect a tortious feoffment and vest the fee simple in the feoffee[11]; and, if he limited a less estate to the feoffee, a tortious reversion vested in himself[12]. However, it was provided by statute that a feoffment should have

no tortious operation[13], and thereafter it conveyed only such estate as the feoffor was entitled to dispose of. Conveyance by livery or livery and seisin, or by feoffment, has been abolished[14].

1 As to feoffment generally see 2 Bl Com (14th Edn) 310 et seq; Challis's Law of Real Property (3rd Edn) 397 et seq. Strictly, 'feoffment', 'feoffor' and 'feoffee' were terms appropriate to a grant in fee simple; 'donation', 'donor' and 'donee' to an estate tail; and 'lease', 'lessor' and 'lessee' to an estate for life: Littleton's Tenures s 57; 2 Bl Com (14th Edn) 316. However, any livery of the seisin for an estate of freehold was commonly called 'feoffment': Challis's Law of Real Property (3rd Edn) 398.

2 Vacant possession did not require that there should be no person at all on the land or in the house other than the feoffor and feoffee. All that was really necessary was that there should be no other person claiming the possession, either on his own account or for another: *Doe d Reed v Taylor* (1833) 5 B & Ad 575.

3 Co Litt 48a; Shep Touch (8th Edn) 209.

4 Co Litt 48b; 2 Bl Com (14th Edn) 315; 2 Preston's Abstracts of Title 291; Challis's Law of Real Property (3rd Edn) 399.

5 Co Litt 48b; 2 Bl Com (14th Edn) 316; Challis's Law of Real Property (3rd Edn) 401.

6 Co Litt 48b, 330b note (1). However, a deed or charter of feoffment was necessary in the case of a feoffment by a corporation aggregate: Co Litt 94b. For a form of a charter of feoffment with memorandum see 2 Bl Com (14th Edn), Appendix no 1.

7 In *Clayton v Clayton* [1930] 2 Ch 12 at 17, the old practice of feoffment with warranty was considered with reference to the right to the custody of title deeds.

8 As to the charter see note 6 supra.

9 See the Statute of Frauds (1677) s 1 (repealed).

10 See the Real Property Act 1845 s 3 (repealed). An example of a custom is the case of gavelkind land: see PARA 14 ante. As to the meaning of 'void at law' see *Zimbler v Abrahams* [1903] 1 KB 577 at 581, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 102-103.

11 A feoffment was the only form of conveyance which had this effect: Co Litt 49a; 2 Sanders on Uses and Trusts (5th Edn) 14-15.

12 A tortious feoffment by a tenant for years or for life, or any other person than a tenant in tail, turned the estate of the freeholder or the remainderman to a right of entry; if the feoffee died in possession, the right of entry was 'tolled by descent cast', and the true owner was put to his right of action: Co Litt 327a-327b. A feoffment by a tenant in tail in possession, or by a person seised in right of another, operated as a discontinuance of the estate tail or other particular estate and the remainders upon it; this meant that the issue and the remaindermen had, when their estates fell into possession, no right of entry, but only a right of action (Littleton's Tenures ss 592-595); but on a feoffment by a husband seised in right of his wife, the wife's right of entry was preserved by statute (32 Hen 8 c 28 (Leases) (1540) s 6 (repealed); Co Litt 326a). The effect of descent cast and discontinuance, and the distinction between rights of entry and rights of action, were abolished by the Real Property Limitation Act 1833 ss 36, 39 (repealed). As to tortious feoffments see generally Challis's Law of Real Property (3rd Edn) 405 et seq.

13 See the Real Property Act 1845 s 4 (repealed).

14 See the Law of Property Act 1925 s 51(1).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(2) TRANSFER INTER VIVOS/(i) Kinds of Assurance/B. ASSURANCES AT COMMON LAW/234. Release and surrender.

234. Release and surrender.

When a person was already in possession of land, his interest in it might be altered at common law without any livery of seisin[1]. If he had no right against the lawful owner, but only an estate gained by disseisin, this estate might be turned to a lawful estate by a release by the disseisee of his right[2]. If he had a limited right, such as an estate for life or for years, and the remainderman or reversioner in fee released all his right to him and his heirs, this enlarged his estate to a fee simple[3]. He was already in possession, and no livery of seisin was required[4].

A surrender was the opposite of a release: in a release the greater future estate was abandoned to and enlarged the smaller particular estate; in a surrender the smaller particular estate was given up to and merged in the greater future estate[5]. It was therefore necessary that the future estate should be the greater: a tenant for life could not surrender to a remainderman for years and there had to be privity of estate between surrenderor and surrenderee; moreover, the surrenderor must be in possession, and since his possession supported the future estate, the surrender took effect without livery of seisin[6].

However, the reduction in the number of legal estates has made such a release almost obsolete. The only occasion on which it could be used is an assurance by a reversioner on a term of years to the lessee, and it is sufficient to express that the reversion is conveyed. The effect is that, in the absence of a contrary intention, the term is merged in the reversion[7]. A surrender is still the proper form of assurance when a term of years is given up to the reversioner and merges in the reversion[8], but in all other cases the distinction between a release and a surrender has ceased to be observed, and a release, like a surrender, implies that a lesser interest in land, such as a term of years or a life interest, or an easement, whether legal or equitable, is given up to be extinguished in a larger estate or interest[9].

1 As to livery of seisin see PARA 233 ante.

2 Littleton's Tenures s 445. This release operated so as to pass the right; it made lawful an estate which before was wrongful: Littleton's Tenures s 466; 2 Bl Com (14th Edn) 325. All express releases had to be by deed: Co Litt 246b. See also DEEDS AND OTHER INSTRUMENTS.

3 The release operated so as to enlarge the estate: Littleton's Tenures s 465; 2 Bl Com (14th Edn) 324. For a release to operate by way of enlarging the estate, there had to be privity of estate between releasor and releasee, ie both estates must exist as estates. A tenant at sufferance could not take a release, although a tenant at will could: Littleton's Tenures s 460; Co Litt 270b; *Butler v Duckmanton* (1607) Cro Jac 169. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 206. Both estates must have been carved out of the same original estate, so that they could still be treated as the same estate in law: 2 Bl Com (14th Edn) 325. A confirmation is in its nature allied to a release. It has been defined as a conveyance of an estate or right in being by which a voidable estate is made sure and unavoidable; where, eg, a remainderman confirms a lease made by a tenant for life who dies during the term (Littleton's Tenures ss 515 et seq; Co Litt 295b et seq; 2 Bl Com (14th Edn) 325); or it might enlarge a particular estate, and then it operated in the same way as a release (2 Bl Com (14th Edn) 326).

4 A release by the freehold reversioner to the lessee for years gave him the freehold and converted his possession into seisin: Littleton's Tenures s 546; Challis's Law of Real Property (3rd Edn) 409.

5 2 Bl Com (14th Edn) 326. 'Surrender properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them': Co Litt 337b; and see 50a. However, there were other kinds of surrenders, such as surrenders of copyholds: see Co Litt 338a; and CUSTOM AND USAGE.

6 2 Bl Com (14th Edn) 326.

7 As to merger see further PARAS 255-256 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 640-641.

8 See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 630 et seq.

9 A joint tenant may release his estate to a co-tenant in whom the land is to be solely vested (see the Law of Property Act 1925 s 36(2) (as amended); and PARA 198 ante); or the transaction may be effected by the two joint tenants conveying to one of them (see s 72(4)).

UPDATE

234 Release and surrender

NOTE 9--See *Burton v Camden LBC* [2000] 2 AC 399, [2000] 1 All ER 943, HL.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(2) TRANSFER INTER VIVOS/(i) Kinds of Assurance/B. ASSURANCES AT COMMON LAW/235. Necessity for deed in a release or surrender.

235. Necessity for deed in a release or surrender.

A release or surrender of an interest in land must be made in writing signed by the person making the release or surrender or by his agent lawfully authorised in writing[1], and in order to be effective to release or surrender a legal estate it must usually be by deed[2].

1 See the Law of Property Act 1925 s 53(1)(a), reproducing the Statute of Frauds (1677) s 3 (repealed). Consequently a release or surrender of an equitable interest must be in writing, and apparently writing is sufficient, even though the transaction is voluntary, but a voluntary assurance is in practice made by deed. See DEEDS AND OTHER INSTRUMENTS.

2 See the Law of Property Act 1925 s 52(1), reproducing, as regards a surrender, the Real Property Act 1845 s 3 (repealed). As to the surrender of a lease for less than three years without a deed see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 632. The requirement of a deed applies to surrenders in writing and not to surrenders by operation of law: Law of Property Act 1925 s 52(2)(c). As to such surrenders see *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644, 772; *Lyon v Reed* (1844) 13 M & W 285 at 305-306; *Wallis v Hands* [1893] 2 Ch 75; *Knight v Williams* [1901] 1 Ch 256; *Metcalfe v Boyce* [1927] 1 KB 758, DC. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 15; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 633 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(2) TRANSFER INTER VIVOS/(i) Kinds of Assurance/B. ASSURANCES AT COMMON LAW/236. Grant.

236. Grant.

Hereditaments which, from their incorporeal nature, were not capable of actual livery were assignable at common law by deed, and accordingly were said to lie in grant[1]. In the case of reversions, the attornment of the tenant was necessary to complete the grant[2], but now the grant of a reversion is effectual without attornment[3].

1 Co Litt 9a. As to incorporeal hereditaments see PARA 81 ante. Although reversions and remainders were treated as incorporeal hereditaments, it was more usual before 1845 for them to be conveyed by one of the modes which, while dispensing with livery of seisin, were appropriate to the conveyance of corporeal hereditaments, namely lease and release, and bargain and sale enrolled: see 1 Preston's Abstracts of Title 85; Challis's Law of Real Property (3rd Edn) 382. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 10.

2 2 Bl Com (14th Edn) 317. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 3.

3 See the Law of Property Act 1925 s 151(1), replacing the Administration of Justice Act 1705 s 9 (repealed). See also *Horn v Beard* [1912] 3 KB 181; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 552.

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C. ASSURANCES UNDER STATUTE

237. Bargain and sale.

The conveyance of corporeal hereditaments by feoffment with livery of seisin[1] was inconvenient in practice[2], and was avoided by means of assurances depending for their effect either in whole or in part on the Statute of Uses[3]. These were a bargain and sale and a lease and release. Under a bargain and sale made for valuable consideration, a use was raised in favour of the purchaser, and this was turned by the Statute of Uses into the legal estate[4]; but the bargain and sale, if passing a freehold interest, was subject to the statutory requirement of enrolment within six months[5]. This method of conveyance cannot now be used[6].

1 As to livery of seisin and feoffment see PARA 233 ante.

2 See 4 Cru Dig (32, Deed c 4 ss 3 et seq).

3 Ie the Statute of Uses (1535) (repealed): see PARA 20 et seq ante.

4 The bargain first vested the use, and then the Statute of Uses (1535) (repealed) vested the possession: *Eustace v Scawen* (1624) Cro Jac 696; 2 Bl Com (14th Edn) 338; Challis's Law of Real Property (3rd Edn) 419 et seq. As to the effect of a nominal consideration see Challis's Law of Real Property (3rd Edn) 420. A bargain and sale might also be made under a common law power created by a direction in a will to the executors to sell; the conveyance took effect as an executory devise, and livery of seisin was not necessary: Williams on the Law of Real Property (24th Edn) 229, 230n; Challis's Law of Real Property (3rd Edn) 383. As to a bargain and sale see further 7 Holdsworth's History of English Law 356 et seq; Megarry and Wade's Law of Real Property (5th Edn) 1170.

5 27 Hen 8 c 16 (Enrolment of Bargains of Lands, etc) (1535) ('Statute of Inrolments') (repealed by the Law of Property (Amendment) Act 1924 s 10, Sch 10). If the bargain and sale was not enrolled, the use was not executed: *Re Sergie, Shribman v Hall* [1954] NI 1 at 33, NI CA. A covenant to stand seised also raised a use and operated under the Statute of Uses (1535) (repealed) to vest the legal estate in the covenantee, but it was restricted to the consideration of marriage or near relationship: see PARA 23 text and notes 8-9 ante; 2 Bl Com (14th Edn) 338. It operated as a bargain and sale if any other consideration was present: see Challis's Law of Real Property (3rd Edn) 421n; 2 Sanders on Uses and Trusts (5th Edn) 58; and *Re Sergie, Shribman v Hall* supra at 23, 29-30.

6 See the Law of Property Act 1925 s 51(1).

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238. Lease and release.

The omission to include leasehold interests in the enactment requiring enrolment[1] was the origin of the assurance which until 1841 was the common mode of conveying corporeal hereditaments[2]. A bargain and sale of a lease for a year operated under the Statute of Uses[3] to place the purchaser in what was deemed to be actual possession, and, being thus in possession, he was capable of taking a release of the reversion in fee simple, which at once operated to enlarge his term of a year into the fee simple. This was the form of assurance

known as a lease and release[4]. It has not been in use since conveyance by deed of grant was introduced in 1845[5], and it became impracticable when the Statute of Uses was repealed in 1925[6].

1 Ie 27 Hen 8 c 16 (Enrolment of Bargains of Lands, etc) (1535) (repealed): see PARA 237 note 5 ante.

2 By 4 & 5 Vict c 21 (Conveyance by release without lease) (1841) (repealed), a release was made as effectual as a lease and release; and by 7 & 8 Vict c 76 (Transfer of Property) (1844) (repealed), which was in operation from 31 December 1844 to 1 October 1845, freehold land might be conveyed by deed without livery of seisin. That Act was repealed by the Real Property Act 1845 s 1 (repealed).

3 Ie the Statute of Uses (1535) (repealed): see PARAS 23, 179 et seq ante.

4 2 Bl Com (14th Edn) 339. As to the effect of a release to a lessee for years see PARA 234 ante. The same form of assurance could be employed without recourse to the Statute of Uses (1535) (repealed), provided the purchaser entered under the lease, and it was sometimes employed in a conveyance by a corporation, which could not be seised to a use (see Challis's Law of Real Property (3rd Edn) 381; and PARA 20 note 4 ante); but the ordinary mode avoided the necessity of entry. The assurance by lease and release depended for its effect, as to the lease, on the Statute of Uses (1535) (repealed), and as to the release, on the common law: Challis's Law of Real Property (3rd Edn) 380. As to conveyance by lease and release see 7 Holdsworth's History of English Law 360 et seq, 374 et seq; Williams on the Law of Real Property (24th Edn) Appendix (A); Megarry and Wade's Law of Real Property (5th Edn) 1171.

5 Ie by the Real Property Act 1845 (repealed): see PARA 239 post.

6 The Statute of Uses (1535) was repealed by the Law of Property Act 1925 s 207, Sch 7 (repealed): see PARA 18 note 10 ante.

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239. Modern deed of grant.

Under the Real Property Act 1845 all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold, were deemed to lie in grant as well as in livery[1]; and under the 1925 legislation all land and all interests in land lie in grant[2] and a conveyance of an interest in land may operate to pass the possession or right to possession without actual entry, but subject to all prior rights[3]. The word 'grant', although appropriate for conveying a freehold estate, is not necessary[4]; 'convey' is equally effectual[5]; and just as a lease and release, operating under the Statute of Uses[6], placed the grantee in actual seisin of the land[7], so now a grant operates by virtue of the Law of Property Act 1925[8] to place the grantee in possession without any entry by him[9].

1 See the Real Property Act 1845 s 2 (repealed).

2 Conveyance by livery is abolished: see PARA 233 ante.

3 See the Law of Property Act 1925 s 51(1).

4 Ibid s 51(2).

5 Moreover words other than 'grant' or 'convey' have been held to be equally effectual if they show the intent of the conveying party. Thus, words of appointment (*Shove v Pincke* (1793) 5 Term Rep 124), and bargain and sale (*Haggerston v Hanbury* (1826) 5 B & C 101), where they could not have their primary effect, were held to operate as words of grant.

6 Ie the Statute of Uses (1535) (repealed): see PARA 18 note 10 ante.

7 As to lease and release see PARA 238 ante.

8 See the Law of Property Act 1925 s 51(1).

9 See *Copestake v Hoper* [1908] 2 Ch 10, CA; Challis's Law of Real Property (3rd Edn) 415 et seq.

(ii) Exchange

240. Exchange at common law.

An exchange of corporeal or incorporeal hereditaments may be effected by an assurance operating at common law, by mutual conveyance, or by order of the Secretary of State[1]. An exchange at common law did not require livery of seisin[2], and it could be made orally, provided the exchange was of corporeal hereditaments in the same county; otherwise it had to be made by deed[3]. An exchange is now void at law unless made by deed[4]. Exchanges operating at common law do not occur in practice[5], except occasionally on an informal straightening of boundaries followed by immediate possession[6].

1 As to exchange by mutual conveyance and by order of the Secretary of State see PARAS 241-242 post.

2 As to livery of seisin see PARA 233 ante.

3 Littleton's Tenures s 62; Co Litt 51b.

4 See the Law of Property Act 1925 s 52(1). However, an exchange completed by possession on both sides has been held to be effective in equity: see *Brown v Patterson* (1899) 43 Sol Jo 298. In so far as this was based on the doctrine of part performance (as to which see SALE OF LAND) note that, since 27 September 1989, this doctrine has been abolished in relation to sales etc of land. Any contract for the sale or other disposition of an interest in land can now only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each: Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), (8). See further SALE OF LAND.

5 Other requirements of a common law exchange were (1) that the estates exchanged should be equal in interest, eg fee simple for fee simple, term of years for the same term; (2) that the word 'exchange' should be used; (3) that there should be entry by each party during their joint lives (Co Litt 51b; 2 Bl Com (14th Edn) 323; and, in relation to the first condition see also *Littlewoods Mail Order Stores Ltd v IRC* [1961] Ch 210 at 228, [1961] 1 All ER 195 at 200; affd [1961] Ch 597, [1961] 3 All ER 258, CA; on appeal sub nom *IRC v Littlewoods Mail Order Stores Ltd* [1963] AC 135, [1962] 2 All ER 279, HL); and (4) that the exchange should be between one person or set of persons on one side and another person or set of persons on the other. There could not be a triangular exchange: *Provost of Eton College v Bishop of Winchester* (1774) 3 Wils 483. Moreover, on a common law exchange, mutual warranties of title were implied with rights of re-entry in case of eviction (2 Bl Com (14th Edn) 300, 323); thus the exchange could not be safely effected without investigation of title on both sides. In this respect the effect of a common law exchange was altered by the Real Property Act 1845 s 4 (repealed), which provided that an exchange made after 1 October 1845 should not imply any condition in law. This is reproduced in the Law of Property Act 1925 s 59(1), by the provision that an exchange or other conveyance of land made after 1 October 1845 does not imply any condition in law. As to exchanges generally see Shep Touch (8th Edn) 289 et seq; 4 Cru Dig (32, Deed c 6 s 20). As to implied covenants for title see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and SALE OF LAND.

6 However, a boundary agreement which does no more than identify on the ground what the documents describe in words or delineate on plans is not a contract for the conveyance of land. A boundary agreement will be presumed to fall within this category, although this presumption is rebuttable: *Neilson v Poole* (1969) 20 P & CR 909.

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241. Exchange by mutual conveyance.

An exchange effected by mutual conveyance depends entirely upon the arrangement between the parties. Each party is in the position both of vendor and purchaser, and each must make a title to the property which he is giving up, and investigate the title to the property which he is taking; and each gives to the other covenants for title, either express or implied, appropriate to the character in which he conveys[1]. It follows from the nature of the transaction that, to the extent to which each is absolute owner, there is no restriction on the amount of or interest in the properties exchanged, and any necessary payment can be agreed upon by way of equality of exchange. When the parties or one of them are or is entitled only for a limited interest, the exchange is usually effected under the powers of exchange conferred by the Settled Land Act 1925[2], or by the settlement under which the limited interest arises[3]. The exchange may be effected either by one document in which each of the parties is a conveying party, or by separate deeds. Where the exchange is effected by separate deeds, each party has the advantage of having the deed relating to the property which he takes.

1 As to implied covenants for title see the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and SALE OF LAND. Cf *Bartram v Whichcote* (1833) 6 Sim 86 at 92.

2 Ie conferred by the Settled Land Act 1925 ss 10(1), 38(iii), 40, 50, 73(1)(v), 101(1). The statutory power (see s 38(iii)) authorises an exchange of easements created de novo: *Re Bracken's Settlement* [1903] 1 Ch 265. Trustees of land, for the purpose of exercising their function as trustees, have in relation to the land subject to the trust all the powers of an absolute owner: Trusts of Land and Appointment of Trustees Act 1996 s 6(1). See further SETTLEMENTS. For the meaning of 'trustees of land' see PARA 66 note 7 ante.

3 As to statutory and express powers of sale see POWERS; SETTLEMENTS.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(2) TRANSFER INTER VIVOS/(ii) Exchange/242. Exchange by order of the Secretary of State.

242. Exchange by order of the Secretary of State.

The Secretary of State[1] may effect exchanges of land under statutory powers[2]. These powers were originally introduced with the object of enabling landowners to avoid the necessity and expense of investigating the title of the land exchanged; but, owing to the simplification of conveyancing subsequently effected by statute, they are now seldom used. The leading principles are that the exchange should be beneficial to the parties; that the terms of the exchange should be just and reasonable[3]; and that on the making of an order the land received is held upon the same trusts, and subject to the same conditions, charges and incumbrances, as the land given in exchange[4].

1 Ie as regards England, the Secretary of State for the Environment, Transport and the Regions and, as regards Wales, the Secretary of State for Wales: see note 2 infra.

2 Ie under the Inclosure Acts 1845 to 1899: see COMMONS vol 13 (2009) PARA 418 et seq. This power was first conferred on the Inclosure Commissioners: Inclosure Act 1845 s 2 (repealed), s 147 (amended by the Statute Law Revision Act 1891). As to the devolution of their powers on the Secretary of State for the Environment, Transport and the Regions or the Secretary of State for Wales see COMMONS vol 13 (2009) PARA 423. The power is

exercisable in respect of land not subject to be inclosed under the Inclosure Acts, or of land subject to be so inclosed, whether proceedings for an inclosure are pending or not: see the Inclosure Act 1845 s 147 (as so amended).

3 It was formerly provided that any deficiency in value should not exceed one-eighth, and that such deficiency could be compensated by a perpetual rentcharge: see the Inclosure Act 1857 ss 6, 8 (both repealed).

4 See the Inclosure Act 1845 s 147 (as amended; see note 2 supra). As to the effect of an order of exchange see *Minet v Leman* (1855) 7 De GM & G 340. The effect of the title generally shifting to the land taken in exchange is that investigation of title on each side is not required. As to investigation of title on a subsequent sale see Williams on Vendor and Purchaser (4th Edn) 453.

UPDATE

242 Exchange by order of the Secretary of State

NOTE 2--Inclosure Act 1845 s 147 repealed: Commons Act 2006 s 48(1), Sch 6 Pt 3 (in force in relation to England: SI 2007/2584).

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(iii) Form and Contents of Assurance

243. Normal requirements of an assurance.

A transfer of registered land must be made by an instrument in the form prescribed by the Land Registration Rules 1925[1] and a person who has the right to apply for first registration[2] may transfer unregistered land by an instrument in the same form[3]. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990[4] and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1997 with effect from 1 April 1998[5].

An assurance of real property which is not required to be made in the prescribed form normally follows the ordinary form of a deed inter partes. It contains the date and parties, the recitals showing the title to the property conveyed and the object of the conveyance, the receipt clause, the actual grant, the description of the property conveyed, and the limitation of the estate taken by the grantee[6]. In addition there are covenants for title which were formerly express, but are now usually implied from the use of the appropriate statutory words[7]; any special covenants required by the nature of the transaction, such as covenants with respect to the user of the property[8]; and, when all the title deeds are not handed over, there is an acknowledgment of the right to production and delivery of copies, and, save in the case of grantors who are trustees or mortgagees, an undertaking for safe custody[9].

1 See the Land Registration Rules 1925, SR & O 1925/1093, Pt III (rr 74-185) (as amended); and LAND REGISTRATION.

2 Ie under the Land Registration Act 1925 s 37: see LAND REGISTRATION.

3 See the Land Registration Rules 1925, SR & O 1925/1093, r 72; and LAND REGISTRATION.

4 See the Registration of Title Order 1989, SI 1989/1347; and LAND REGISTRATION.

5 See the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1); the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

6 As to the formal parts of a deed, its execution, recitals, receipt clauses and parcels see DEEDS AND OTHER INSTRUMENTS. See further SALE OF LAND. An express limitation of a fee simple estate is not now essential (see PARA 93 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 242 et seq), although it is usually inserted. A deed inter partes, formerly known as an indenture, now usually commences with a word descriptive of the transaction to be effected, such as conveyance, lease, settlement or mortgage: see the Law of Property Act 1925 ss 56(2), 57; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 3.

7 In most cases of dispositions on or after 1 July 1995, covenants for title vary according to whether the disposition is expressed to be made with full title guarantee or with limited title guarantee. As to the covenants implied by the use of these words see the Law of Property (Miscellaneous Provisions) Act 1994 ss 1-9. As to the covenants implied in dispositions prior to 1 July 1995 see the Law of Property Act 1925 s 76 and the Land Registration Act 1925 s 24(1)(a) (both repealed). For transitional provisions see the Law of Property (Miscellaneous Provisions) Act 1994 ss 11-13. As to the implied covenants and also express covenants see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 247 et seq; MORTGAGE vol 77 (2010) PARA 223; SALE OF LAND; SETTLEMENTS; TRUSTS. As to covenants for title generally see Rawle's Law of Covenants for Title (4th Edn) 1 et seq. As to the old doctrine of warranty see Littleton's Tenures ss 697 et seq, and Co Litt 365a et seq; and also *Clayton v Clayton* [1930] 2 Ch 12 at 17.

8 As to such special covenants see EQUITY vol 16(2) (Reissue) PARA 613 et seq; SALE OF LAND.

9 See the Law of Property Act 1925 s 64; and SALE OF LAND vol 42 (Reissue) PARA 299.

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244. Conveying parties.

Until the contrary is proved, the persons expressed to be parties to a conveyance are presumed to be of full age[1] at the date of the conveyance[2]. In conveyances made after 12 August 1859, personal property, including chattels real[3], may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person[4]. Similarly, in conveyances made after 31 December 1881, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person[5]. After 31 December 1925 a person may convey land to or vest land in himself[6].

1 A person attains full age on reaching the age of 18: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

2 Law of Property Act 1925 s 15.

3 For the meaning of 'chattels real' see PARAS 2-3 ante.

4 Law of Property Act 1925 s 72(1). See also note 6 infra.

5 See ibid s 72(2); and note 6 infra.

6 Ibid s 72(3). This could have been done before 1926 by a conveyance to uses, and s 72(3) is consequent on the repeal of the Statute of Uses (1535) (repealed): see PARA 18 note 10 ante. As to a conveyance by two or more persons to one or more of themselves see the Law of Property Act 1925 s 72(4); and PARA 234 note 9 ante. Such a conveyance may also be effected by release: see PARA 234 note 9 ante. However s 72(3), (4), does not enable a person to grant a lease to himself, and does not enable two or more persons to grant a lease to all of themselves: see *Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL. Nor can a nominee grant a lease to his principal, at any rate one which is not a bare term containing no covenants by either party: *Ingram v IRC* [1997] 4 All ER 395, CA.

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245. Conveyance of land without consideration.

Before the repeal of the Statute of Uses[1], a resulting trust for the grantor was implied where freehold land was conveyed[2] by deed without consideration or a declaration of use to another, and the implied trust was executed by the Statute of Uses, with the consequence that the estate conveyed resulted to the grantor[3]. After the repeal of the Statute of Uses a resulting trust for the grantor is not implied in a voluntary conveyance merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee[4].

1 Ie the Statute of Uses (1535) (repealed): see PARA 18 note 10 ante.

2 The statement in the text was inapplicable to the appointment of a use under a power of appointment.

3 *Beckwith's Case* (1589) 2 Co Rep 56b at 58; *Armstrong d Neve v Wholesey* (1755) 2 Wils 19; 1 Sanders on Uses and Trusts (5th Edn) 97 et seq; Gilbert's Law of Uses and Trusts (3rd Edn) 233; Burton's Compendium 38, 42-43; Williams on the Law of Real Property (13th Edn) 160, 190, (20th Edn) 172, 203; 2 Davidson's Precedents in Conveyancing (4th Edn) 182; Williams on Settlements 17-19, 22, 38.

4 See the Law of Property Act 1925 s 60(3), (4). For the probable effect of this provision see TRUSTS vol 48 (2007 Reissue) PARA 718. The rule stated in the text thus applies only to conveyances executed after 1925; and the term 'conveyance' is defined very broadly in s 205(1)(ii): see PARA 232 note 1 ante. As regards the creation of resulting trusts by reason of circumstances other than 'merely' that the property is not expressed to be conveyed for the use and benefit of the grantee see GIFTS vol 52 (2009) PARA 241 et seq; TRUSTS vol 48 (2007 Reissue) PARA 705.

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246. Conveyance on behalf of estate owner.

It is the principle of the Law of Property Act 1925 that, so far as practicable, title to land must be shown by a succession of dispositions or devolutions of the legal estate[1]; equitable interests are kept in the background, and are either overreached by the conveyance or are got in by assignment or release to the grantor before conveyance[2]. In furtherance of this principle various matters and dispositions which are not actually conveyances by the estate owner[3] are treated as though he were a conveying party. Thus (1) every vesting order made by a court or other competent authority[4]; (2) every vesting declaration (express or implied) under any statutory power[5]; (3) every vesting instrument made by the trustees of a settlement or other persons under the Settled Land Act 1925[6]; (4) every conveyance by a person appointed for the purpose by the court or authorised under any statutory power to convey in the name or on behalf of an estate owner[7]; and (5) every conveyance made under any power reserved or conferred by the Law of Property Act 1925[8], which is made for the purpose of vesting, conveying or creating a legal estate, operates as though it had been executed by the estate owner[9].

1 As to the title to be shown to legal estates see the Law of Property Act 1925 s 10(1); and SALE OF LAND vol 42 (Reissue) PARA 141 et seq.

2 It may be convenient for the equitable owner to concur in the conveyance (see ibid s 43(1)), although, since this brings his equitable interest onto the title, it is better for it to be got in separately (see s 42 (as amended); and SALE OF LAND).

3 For the meaning of 'estate owner' see PARA 47 ante.

4 Law of Property Act 1925 s 9(1)(a). For examples of vesting orders see PARA 232 note 5 ante.

5 Ibid s 9(1)(b). As to vesting declarations see the Trustee Act 1925 s 40 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 866; the Law of Property Act 1925 s 88(3); and MORTGAGE vol 77 (2010) PARA 134.

6 Ibid s 9(1)(c). As to vesting instruments see the Settled Land Act 1925 ss 4-10 (as amended); and SETTLEMENTS. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made thereafter: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

7 Law of Property Act 1925 s 9(1)(d). See also the Trustee Act 1925 s 50 (power to appoint a person to convey); and TRUSTS vol 48 (2007 Reissue) PARA 879. Where any statutory power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power must, when practicable, be exercised in the name and on behalf of the estate owner: see the Law of Property Act 1925 s 7(4). As to powers to lease see s 8.

8 Ibid s 9(1)(e). The provisions of any statutes conferring special facilities or prescribing special modes, whether by way of registered memorial or otherwise, for disposing of or acquiring land, or providing for the vesting, by conveyance or otherwise, of the land in trustees or any person, or the holder for the time being of an office or any corporation sole or aggregate, including the Crown, are reserved by s 7(3)(c); but this does not authorise an entailed interest to take effect otherwise than as an equitable interest: s 7(3) proviso. As to powers conferred see eg s 22 (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; amended by the Mental Health Act 1983 s 148, Sch 4 para 5(a)) (conveyance on behalf of mentally disordered persons); and MENTAL HEALTH vol 30(2) (Reissue) PARA 687; the Law of Property Act 1925 s 88 (conveyance by mortgagee on behalf of mortgagor); and MORTGAGE vol 77 (2010) PARA 101 et seq. No further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARAS 105, 119 ante.

It is optional whether a mortgagee conveying under his statutory power of sale does so in his own name or in the name of the mortgagor as estate owner: Law of Property Act 1925 s 88(1). As to the reservation of a legal estate see s 65; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 239. A deed containing a declaration (executed after 1925) by the estate owner that his estate is to go and devolve in such a manner as may be requisite for confirming any interests intended to affect his estate and capable under the Law of Property Act 1925 of subsisting as legal estates which, at some prior date, were expressed to have been transferred or created, and any dealings therewith which would have been legal if those interests had been legally and validly transferred or created, operates, to the extent of the estate of the estate owner, but without prejudice to the statutory restrictions imposed in the case of mortgages, to give legal effect to the interests so expressed to have been transferred or created and to those subsequent dealings: see s 66(1), (3). The powers so conferred may be exercised by a tenant for life or statutory owner, trustee of land or a personal representative, being in each case an estate owner, as well as by an absolute owner, but if exercised by any person other than an absolute owner, only with the leave of the court: s 66(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (12)). The county court has jurisdiction under the Law of Property Act 1925 s 66 (as amended) where the land which is to be dealt with in the court does not exceed £30,000 in capital value: s 66(4) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt II para 2(1), (3); amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule). For the statutory form see the Law of Property Act 1925 s 206(1), Sch 5, Form 7 (amended by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 s 9).

9 Law of Property Act 1925 s 9(1). As to exercising powers in the name and on behalf of the estate owner see note 7 supra. Where the order, declaration or conveyance is made in favour of a purchaser, the provisions of the Law of Property Act 1925 relating to a conveyance of a legal estate to a purchaser apply; and the provisions of the Trustee Act 1925 relating to vesting orders and orders appointing a person to convey apply to all vesting orders authorised to be made by the Law of Property Act 1925 Pt I (ss 1-39) (as amended): s 9(2), (3).

(iv) Overreaching Powers

247. Exercise of overreaching powers.

The power of an estate owner[1] to transfer the legal estate may carry with it the power to overreach such equitable interests as can be represented in terms of money, and then, upon a transfer of the legal estate by way of sale, the purchaser takes the legal estate free from such equitable interests[2], and these attach to the proceeds of sale[3]. However, this is not allowed where the equitable interest is protected by a deposit of documents relating to the legal estate affected[4].

The mode and effect of this exercise of the power to overreach equitable interests depends on the state of the title, according as the sale is made (1) under the powers of the Settled Land Act 1925[5]; (2) by trustees of land[6]; (3) by a mortgagee or personal representative[7]; (4) under a court order[8].

1 For the meaning of 'estate owner' see PARA 47 ante.

2 As to the power to overreach equitable interests see generally paras 248-249 post. For a general discussion of that power see Charles Harpum 'Overreaching, trustee's powers and the reform of the 1925 legislation' [1990] CLJ 277.

3 See the Settled Land Act 1925 s 75(5); and the Law of Property Act 1925 s 3(1)(c) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (3)); para 186 ante; and SETTLEMENTS.

4 See the Law of Property Act 1925 ss 2(3)(i), 13. It is no longer possible to create a mortgage merely by the deposit of title deeds: see PARA 194 note 5 ante.

5 As to these powers see ibid s 2(1)(i); para 248 post; and SETTLEMENTS.

6 See ibid s 2(1)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(1), (2)); and PARA 249 post.

7 See the Law of Property Act 1925 s 2(1)(iii); and PARA 250 post.

8 See ibid s 2(1)(iv); and PARA 251 post.

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248. Sale under the Settled Land Act 1925.

A conveyance to a purchaser of a legal estate in land made under the powers conferred by the Settled Land Act 1925[1], or any additional powers conferred by the settlement, by the tenant for life in whom the settled land is declared by a principal vesting instrument to be vested[2], overreaches any equitable interest or power affecting that estate, whether or not the purchaser has notice of it, if the equitable interest or power is capable of being overreached by it, and the statutory requirements respecting the payment of capital money are complied with[3]. Generally the equitable interests which are capable of being overreached are those which arise under the trust instrument[4], but they include also the charge of a limited owner and a general equitable charge within the meaning of the Land Charges Act 1972[5], notwithstanding that they are registered under that Act[6]. The effect is that a sale under the Settled Land Act 1925 overreaches all such equitable interests as are capable of being represented in terms of money, whether arising under the settlement or having priority to the settlement[7]. A settlement

can be specially created for the purpose of overreaching equitable interests which do not arise under a trust instrument. The trustees of such a settlement must be two or more individuals approved or appointed by the court or a trust corporation. The owner will thereupon have the statutory powers[8] of a tenant for life, and can by a conveyance made in exercise of such powers overreach the equitable interests and powers[9].

1 As to these powers see SETTLEMENTS.

2 For the meaning of 'principal vesting instrument' and 'tenant for life' see the Settled Land Act 1925 ss 5, 19, 20, 117(1)(xxviii), (xxxi) (s 20 as amended); and SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement and no settlement is deemed to be made under that Act thereafter: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 65 ante.

3 See the Law of Property Act 1925 s 2(1)(i). Capital money must not be paid to fewer than two persons as trustees of a settlement, unless the trustee is a trust corporation: Settled Land Act 1925 s 94(1). See generally SETTLEMENTS.

4 See ibid s 72. As to the trust instrument see s 4(1), (3); and see generally SETTLEMENTS.

5 As to a 'limited owner's charge' and a 'general equitable charge', and for the meaning of both terms see the Land Charges Act 1972 s 2(1), (4)(ii), (iii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 12(1)); the Land Charges Act 1972 s 18(6); and LAND CHARGES.

6 Settled Land Act 1925 s 72(3)(b). The provision that a general equitable charge may be overreached even though registered in effect cancels the registration and places a charge affecting settled land which is prior to the settlement in the same position as a charge arising under the settlement. Each is overreached by a sale under the statutory power and transferred to the proceeds of sale. The sale also overreaches an annuity created before 1926 which was not registered in the old register of annuities, but which has since 1925 been registered as a land charge in Class E: see s 72(3)(a); the Land Charges Act 1972 ss 1(4), 2(1), (6), 17(1), 18(6), Sch 1 paras 1-3 (s 17(1) as amended); RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 770; and LAND CHARGES.

7 As to the overreaching effect in respect of other equitable interests see PARA 249 post, where the provisions of the Settled Land Act 1925 s 72 are compared with the corresponding provisions of the Law of Property Act 1925 s 2(3).

8 Ie the powers under the Settled Land Act 1925 Pt II (ss 38-72) (as amended): see SETTLEMENTS.

9 See ibid s 21. The overreaching effect of a conveyance under such an ad hoc settlement is slightly greater than that of a conveyance under an ordinary settlement: see generally SETTLEMENTS. See, however, note 2 supra.

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249. Sale by trustees of land.

A conveyance to a purchaser of a legal estate in land made by trustees of land[1] overreaches any[2] equitable interest or power affecting that estate if the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees[3] and if capital money arising on such a conveyance is paid to or applied by the direction of no fewer than two persons as trustees or a trust corporation[4]. If, at the date of the conveyance[5], the trustees (whether original or substituted) are either two or more individuals approved or appointed by the court or their successors in office, or a trust corporation, the conveyance also overreaches any equitable interest or power having priority to the trust[6]. This latter overreaching effect does not extend to any equitable interest protected by a deposit of documents relating to the legal estate affected[7], to certain equitable interests which cannot be represented in terms of money[8], or to any equitable interest protected by registration under the Land Charges Act 1972[9]. However, since three of the interests so protected can be represented in terms of money, and

so can be satisfied out of the proceeds of sale, namely an annuity[10], a limited owner's charge and a general equitable charge, these are not included in the last exception, and are therefore overreached by a conveyance made by guaranteed trustees, notwithstanding that they are registered under the Land Charges Act 1972[11]. Certain interests which were created before 1926[12], and so could not at their creation be registered as land charges[13], are not overreached by a conveyance under a guaranteed trust, but a purchaser only takes subject to them if he has notice of them[14].

1 For the meaning of 'trustees of land' see the Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(b); and PARA 66 note 7 ante.

2 Including an equitable interest which, if it were not overreached, would be an overriding interest under the Land Registration Act 1925 s 70(1)(g): *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL. For the meaning of 'legal estate' and 'equitable interest' see PARAS 46-47 ante.

3 Law of Property Act 1925 s 2(1)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (2)(a)). The equitable interests and powers capable of being overreached are those arising under the trust. It has been argued that it is also necessary that the disposition should have been within the powers of the trustees: see Charles Harpum 'Overreaching, trustee's powers and the reform of the 1925 legislation' [1990] CLJ 277; and the reference to that article in *State Bank of India v Sood* [1997] Ch 276 at 281, [1997] 1 All ER 169 at 172, CA. For the general powers of trustees of land see the Trusts of Land and Appointment of Trustees Act 1996 ss 6, 8; and TRUSTS vol 48 (2007 Reissue) PARA 1035.

An equitable interest in land subject to a trust of land which remains in, or is to revert to, the settlor is (subject to any contrary intention) also overreached by the conveyance if it would be so overreached were it an interest under the trust: Law of Property Act 1925 s 2(1A) (added by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(2)(b)).

4 See the Law of Property Act 1925 s 2(1)(ii) (as amended: see note 3 supra); s 27(2) (substituted by the Law of Property (Amendment) Act 1926 s 7, Schedule; amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(1), (8)). Under the Law of Property Act 1925 s 2(1)(ii) (as so amended), compliance with the statutory requirements respecting payment of capital money is required only if capital money arises under the conveyance. There is no requirement that capital money has to arise contemporaneously with the disposition; accordingly, overreaching can occur even if no capital money arises: *State Bank of India v Sood* [1997] Ch 276, [1997] 1 All ER 169, CA.

5 This only applies to a conveyance made after 1925: see the Law of Property Act 1925 s 2(2) (as amended: see note 6 infra), s 209(2) (repealed).

6 Ibid s 2(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(2)(c)). Such trustees are subsequently referred to as 'guaranteed trustees'. For the meaning of 'trust corporation' see the Law of Property Act 1925 s 205(1)(xxviii); the Law of Property (Amendment) Act 1926 s 3; and TRUSTS vol 48 (2007 Reissue) PARA 798.

7 Law of Property Act 1925 s 2(3)(i): see PARA 247 note 4 ante.

8 Ie (1) the benefit of any covenant or agreement restrictive of the user of land; (2) any easement, liberty or privilege over or affecting land and being merely an equitable interest (an 'equitable easement'); (3) the benefit of any contract (an 'estate contract') to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right: see ibid s 2(3)(ii)-(iv). The trust of land will not overreach these whether registered under the Land Charges Act 1972 or not, although if they are created after 1925 and are not registered they are void against a purchaser of the legal estate, and so he takes free from them: see s 4(6) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 634.

9 See the Law of Property Act 1925 s 2(3)(v); and the Land Charges Act 1972 s 18(6).

10 The annuities overreached are only those within the definition in ibid s 17(1): see PARA 248 note 6 ante.

11 See the Law of Property Act 1925 s 2(3). This exclusion from s 2(3)(v) of an annuity, a limited owner's charge and a general equitable charge corresponds to the like provision in the Settled Land Act 1925 s 72(3): see PARA 248 ante. There is no general overreaching provision in s 72 in respect of equitable interests having priority to the settlement; thus there is no exception of restrictive covenants, estate contracts and equitable interests protected by registration, but there is an exception of equitable easements if registered: see s 72(2)(iii).

12 These are (1) the benefit of any covenant or agreement restrictive of the user of the land; (2) any equitable easement; (3) the interest under a puisne mortgage within the meaning of the Land Charges Act 1925 (repealed and replaced: see note 13 infra) unless and until acquired under a transfer made after 1925; and (4) the benefit of an estate contract, unless and until the same is acquired under a conveyance made after 1925: see the Law of Property Act 1925 s 2(5).

13 Ie under the Land Charges Act 1925 (repealed and replaced by the Land Charges Act 1972: see LAND CHARGES). However, a puisne mortgage ceased to be within the Law of Property Act 1925 s 2(5) as soon as acquired under a transfer made after 1925: see s 2(5)(c) cited in note 12 head (3) supra.

14 See ibid s 2(5). These interests simply remain subject to the rule that a purchaser of a legal estate takes subject only to equitable interests of which he has notice: see s 1(4); and EQUITY vol 16(2) (Reissue) PARA 565.

UPDATE

249 Sale by trustees of land

NOTE 2--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

TEXT AND NOTES 3, 4--The two-trustees rule is not satisfied by money being paid to or dealt with as directed by, or a receipt for money being given by, a relevant attorney or by a conveyance or deed being executed by such an attorney: Trustee Delegation Act 1999 s 7(1). 'Relevant attorney' means a person, other than a trust corporation within the meaning of the Trustee Act 1925, who is acting either both as a trustee and as attorney for one or more other trustees, or as attorney for two or more trustees, and who is not acting together with any other person or persons: Trustee Delegation Act 1999 s 7(2).

NOTE 3--Commercial interests, as distinct from interests of a family nature, are the only interests that are exempt from being overreached: *Birmingham Midshire Mortgage Services Ltd v Sabherwal* (1999) 80 P & CR 256, CA.

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250. Sales by mortgagees and personal representatives.

A conveyance to a purchaser of a legal estate in land made by a mortgagee or a personal representative in the exercise of his paramount powers overreaches any equitable interest or power affecting that estate, whether or not the purchaser has notice of it, provided the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representatives[1].

1 Law of Property Act 1925 s 2(1)(iii). As to the paramount powers of a mortgagee see MORTGAGE vol 77 (2010) PARA 392 et seq; and as to the paramount powers of a personal representative see EXECUTORS AND ADMINISTRATORS. For the meaning of 'legal estate' and 'equitable interest' see PARAS 46-47 ante.

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251. Sale by the court.

A conveyance to a purchaser of a legal estate in land sold under a court order overreaches any equitable interest or power affecting that estate, whether or not the purchaser has notice of it, if the equitable interest or power is bound by the order, and any capital money arising from the transaction is paid into court or paid in accordance with the court order[1].

1 Law of Property Act 1925 s 2(1)(iv). The order binds the equitable interests in the land affected of all persons who are either parties to or bound by the proceedings in which the order is made: *Cole v Sewell* (1849) 17 Sim 40; *Re Williams' Estate* (1852) 5 De G & Sm 515; *Basnett v Moxon* (1875) LR 20 Eq 182 at 184. The statutory provision only states the rule that where there are no other equitable interests, a purchaser gets a good title by the conveyance to him of the legal estate (*Re Whitham, Whitham v Davies* (1901) 84 LT 585), but not if there are equitable interests which are outstanding in persons who are neither parties to nor bound by the proceedings (*Freeland v Pearson* (1869) LR 7 Eq 246; *Jones v Barnett* [1900] 1 Ch 370, CA). A court order is conclusive, in favour of a purchaser, as regards jurisdiction, concurrence, consent, notice or service: see the Law of Property Act 1925 s 204(1). For the meaning of 'legal estate' and 'equitable interest' see PARAS 46-47 ante.

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252. Saving for rights of person entitled to equitable charge.

Subject to the protection afforded by the overreaching provisions[1] to the purchaser of a legal estate, a person entitled to an equitable charge is not deprived of any of his rights or remedies for enforcing the charge[2].

1 Ie by the Law of Property Act 1925 s 2 (as amended): see PARAS 247-251 ante.

2 Ibid s 2(4). As to the realisation of equitable charges by the court see s 90 (as amended); and MORTGAGE vol 77 (2010) PARA 625.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(3) EXTINCTION OF TITLE/253. Forfeiture.

(3) EXTINCTION OF TITLE

253. Forfeiture.

An estate in land may be forfeited for breach of condition and for denying the title of the lord under whom the land is held[1]. An estate created upon condition can be defeated by re-entry for breach of the condition[2].

Denial of the lord's title might under the feudal system be a cause of forfeiture[3], and it may still be a ground of forfeiture as between landlord and tenant[4]. In each of the previous cases the estate remains vested in the original owner until the right of entry is exercised, and the person entitled to the right of entry has an option whether or not to exercise it[5].

1 As to forfeiture see generally 2 Bl Com (14th Edn) 267 et seq, and as to forfeiture by limited owners see Co Litt 251a et seq. Unauthorised alienation in mortmain as a cause of forfeiture was abolished by the Charities Act 1960 ss 38(1), 48(2), Sch 7 Pt II (repealed): see CHARITIES vol 8 (2010) PARAS 82-83. Forfeiture on conviction of treason or felony was abolished by the Forfeiture Act 1870 s 1 (repealed by the Statute Law (Repeals) Act 1993); and an alien is able to acquire, hold and dispose of real property in the United Kingdom: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. Formerly a feoffment in fee or a fine by a tenant for life was a forfeiture of his estate; it vested a tortious fee in the feoffee, but gave the remainderman an immediate right of entry: see PARA 233 notes 11-12 ante. There was formerly forfeiture to the owner of the inheritance for waste committed by tenants in dower, by the curtesy, for life or for years: see 6 Edw 1 (Statute of Gloucester) (1278) (repealed); 2 Bl Com (14th Edn) 283; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 434-435. Bankruptcy involves a species of forfeiture, since all the property of a bankrupt passes to his trustee in bankruptcy: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 390 et seq.

2 As to an estate in fee upon condition see PARA 97 et seq ante. As to forfeiture for breach of a condition in a lease see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq.

3 See 2 Bl Com (14th Edn) 275.

4 See *Warner v Sampson* [1959] 1 QB 297, [1959] 1 All ER 120, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 605.

5 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 603 et seq.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(3) EXTINCTION OF TITLE/254. Escheat.

254. Escheat.

Formerly, when a tenancy in fee simple came to an end for any reason, the land went back to the lord of whom the tenant held, and he was said to take by escheat[1]. The commonest instances were escheat for want of heirs (*propter defectum sanguinis*), which occurred when a tenant in fee simple died intestate without leaving an heir-at-law, and escheat on conviction of felony (*propter delictum tenentis*), but both these have been abolished[2]. Escheat in other cases is still possible but rare. An example is where the land is disclaimed by the trustee in bankruptcy of the former owner[3], and another possible case is on the dissolution of a corporation not governed by the Companies Act 1985[4].

1 As to escheat (and reverter) see PARA 6 ante. In practice the lord was usually impossible to ascertain, and the land escheated to the Crown as the lord paramount. See also *Re Lowe's Will Trusts, More v A-G* [1973] 2 All ER 1136, [1973] 1 WLR 882, CA.

2 Escheat for want of heirs was abolished by the Administration of Estates Act 1925 s 45(1)(d), and the Crown now takes the land or the proceeds of sale, so far as they fall into residue, as bona vacantia (ss 33(4), 46(1)(vi) (reproduced without amendment in the Intestates' Estates Act 1952, Sch 1)): see EXECUTORS AND ADMINISTRATORS. Escheat on conviction of felony was abolished by the Forfeiture Act 1870 s 1 (repealed by the Statute Law (Repeals) Act 1993).

3 *British General Insurance Co Ltd v A-G* [1945] LJNCCR 113. See also the lecture by T Cyprian Williams in 75 Sol Jo 843 et seq (discussing the position under the Bankruptcy Act 1869 s 23 (repealed)). For the present provisions as to disclaimer of a bankrupt's property by his trustee in bankruptcy see the Insolvency Act 1986 ss 315-321 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 472-489.

4 As to the effect of dissolution of a chartered corporation see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304. The former theory that the land reverted to the donor in such a case is no longer accepted: see PARA 91 note 6 ante. As to escheat generally see further EQUITY vol 16(2) (Reissue) PARA 555; EXECUTORS AND ADMINISTRATORS.

255. Merger at law.

Merger is an act of law[1], and, prior to the alteration effected by statute[2], took place when a particular estate in land and a subsequent estate both became vested in the same person without any intervening estate in another person[3]. The particular estate was then at law merged or drowned in the subsequent estate[4]. Generally, it was essential that the particular estate should not be greater than the subsequent estate[5]. However, the principle of merger was subject to two exceptions. There was no merger at law if the person in whom the two interests united held them in different rights, where, for instance, he held a term of years as executor and the reversion in his own right[6]; and an estate tail in freeholds has always been exempt from merger, and consequently cannot be destroyed by coming in contact with another estate tail or a remainder in fee simple in the same person[7].

1 3 Preston's Conveyancing 6-7. The whole of the third volume of that work is devoted to the subject of merger.

2 Ie the alteration effected by the Supreme Court of Judicature Act 1873 s 25(4) (repealed by the Law of Property Act 1925 s 207, Sch 7, and replaced by s 185: see PARA 256 post).

3 2 Bl Com (14th Edn) 177; 3 Preston's Conveyancing 50; Challis's Law of Real Property (3rd Edn) 86. See also *Wiscot's Case, Giles v Wiscot* (1599) 2 Co Rep 60b at 61b note (iv).

4 2 Bl Com (14th Edn) 177. The operation of merger is similar to that of surrender (see PARA 234 ante), and thus it is said that a merger only takes place where a surrender of the particular estate to the owner of the subsequent estate is possible (3 Preston's Conveyancing 152; Challis's Law of Real Property (3rd Edn) 87); but an express surrender takes effect in accordance with the intention of the parties, and the merger is then a consequence of the surrender: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 632. Merger at law is independent of intention and follows upon the mere vesting of the estates in the same person. As to the different effect in certain cases of surrender and merger see Challis's Law of Real Property (3rd Edn) 88.

5 3 Preston's Conveyancing 50. Thus a term of years will merge in the reversion (*Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631 at 652, CA; 2 Bl Com (14th Edn) 177), and a partial merger could take place at law where the term or the reversion was held in undivided moieties (*Bovy's Case* (1672) 1 Vent 193; *White v Greenish* (1861) 11 CBNS 209 at 233). An estate for life will merge in the inheritance in reversion (Co Litt 338b; *Re Dunsany's Settlement, Nott v Dunsany* [1906] 1 Ch 578 at 582, CA; 3 Preston's Conveyancing 255), and, since an estate for a man's own life is deemed to be larger than an estate pur autre vie (see PARAS 151-152 ante), the latter estate may merge in the former, but not vice versa (*Barry Rly Co and Lord Wimborne and Vendor and Purchaser Act 1874* (1897) 76 LT 489 at 492). See also *Lemon v Mark* [1899] 1 IR 416 at 435, Ir CA. The result is the same as regards these estates, notwithstanding that they are now equitable interests (see PARA 46 ante); but this rule does not apply to terms of years, and a term in possession merges in a shorter term in reversion: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 640. As to the effect of a release or a surrender see PARA 234 ante.

6 2 Bl Com (14th Edn) 177; 3 Preston's Conveyancing 51, 309; *Chambers v Kingham* (1878) 10 ChD 743; *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227 at 231, CA. There was no merger at law if the person in whom the two interests united held (formerly) a term of years in his own right and the reversion in right of his wife: Co Litt 338b; *Lady Platt v Sleap* (1611) Cro Jac 275; *Doe d Blight v Pett* (1840) 11 Ad & El 842; *Jones v Davies* (1861) 7 H & N 507, Ex Ch; *Hurley v Hurley* [1908] 1 IR 393. As to the property of a married woman under the present law see PARA 230 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

7 *Wiscot's Case, Giles v Wiscot* (1599) 2 Co Rep 60b at 61a ('an estate tail cannot be merged nor surrendered, nor extinguished by accession of a greater estate'); *Roe d Crow v Baldwere* (1793) 5 Term Rep 104 at 109; *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658 at 679, HL; 2 Bl Com (14th Edn) 177; *Re Dunsany's Settlement, Nott v Dunsany* [1906] 1 Ch 578 at 582, CA; 3 Preston's Conveyancing 246, 341 et seq; Challis's Law of Real Property (3rd Edn) 93. An estate tail after possibility of issue extinct (see PARA 148 ante) merges on the acquisition of the fee: Co Litt 27b; 3 Preston's Conveyancing 240. No further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and PARAS 105, 119 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(3) EXTINCTION OF TITLE/256. Merger in equity.

256. Merger in equity.

In equity, the question of merger does not depend upon the mere fact of the union of the estates in the same person, but upon the intention of the parties concerned, and where no intention is expressed or can be implied from the surrounding circumstances, it may be presumed from a consideration of the interests or the duty of the person concerned[1]. In this respect the same principles apply to the merger of estates and to the merger of charges on the land[2]. There can be no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity[3]. Consequently, in questions of merger, whether arising in reference to legal or equitable estates, the equitable rule now prevails, and merger is not recognised as having taken place contrary to the express or implied intention of the parties[4].

1 As to merger generally see EQUITY vol 16(2) (Reissue) PARA 764 et seq; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 640-641. An intention may be gathered from subsequent dealings with the property: *Lea v Thursby* [1904] 2 Ch 57.

2 As to the discharge of mortgages and merger generally see MORTGAGE vol 77 (2010) PARA 629 et seq.

3 Law of Property Act 1925 s 185, replacing the Supreme Court of Judicature Act 1873 s 25(4) (repealed).

4 As to the equitable doctrine of merger see further Challis's Law of Real Property (3rd Edn) 94-97. As to the preservation and extinction of satisfied terms see PARA 112 et seq ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(3) EXTINCTION OF TITLE/257. Extinguishment analogous to merger.

257. Extinguishment analogous to merger.

When the same person has the legal estate in fee simple and is absolutely entitled as beneficiary to the beneficial ownership, this beneficial ownership is, by an operation analogous to merger, extinguished in the legal ownership[1].

1 *Selby v Alston* (1797) 3 Ves 339; *Re Douglas, Wood v Douglas* (1884) 28 ChD 327, where an equitable estate acquired by an heir under an election merged in the legal estate acquired as heir; *Re Cook, Beck v Grant* [1948] Ch 212 at 215, [1948] 1 All ER 231 at 232. It was held that an equitable estate held by tenants in common might merge in an equal and co-extensive legal estate held by the same persons as joint tenants (*Re Selous, Thomson v Selous* [1901] 1 Ch 921), but this has been criticised (see Williams on Vendor and Purchaser (4th Edn) 501 note (r)). There is no merger if the equitable and legal estates are not co-extensive: *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 126; *Merest v James* (1821) 6 Madd 118.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/6. ACQUISITION, TRANSFER AND EXTINCTION OF TITLE/(3) EXTINCTION OF TITLE/258. Adverse possession.

258. Adverse possession.

When the owner of land has been out of possession, and a stranger has been in possession, for a period sufficient to bar the owner's right to re-enter or to recover possession by action, the owner's title is extinguished[1], and the stranger acquires a title which is good against all the world, including the former owner[2].

The Limitation Act 1980 operates negatively to bar the right and extinguish the title of the true owner, and does not effect a transfer of his estate to the stranger; the new title depends on the principle that possession gives a title, coupled with the extinction of the right of the former owner, and it is subject to any easements, restrictive covenants and other rights which remain unextinguished[3].

1 See the Limitation Act 1980 s 17 (replacing the Limitation Act 1939 s 16).

2 As to land generally see LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq.

3 As to the effect of expiration of the period of limitation see LIMITATION PERIODS vol 68 (2008) PARA 1095 et seq.

UPDATE

258 Adverse possession

NOTE 1--Limitation Act 1980 s 17(b) repealed: Land Registration Act 2002 Sch 13.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(1) HISTORY/259. Real action.

7. ACTIONS FOR THE RECOVERY OF LAND

(1) HISTORY

259. Real action.

Formerly actions to recover land varied in form according to whether they were brought to recover a freehold or leasehold interest, that is to recover seisin or possession. Seisin might be recovered in a real action, either proprietary or possessory[1]. The possessory action assumed that the claimant had a right of entry, but under certain circumstances, where, for instance, a disseisor had died in possession and the tortious freehold had descended to his heir, the right of entry was 'tolled' and the owner was left to his proprietary action[2].

1 3 Bl Com (14 Edn) 180 et seq. See also PARA 5 note 26 ante. As to seisin and disseisin see 7 Holdsworth's History of English Law 23 et seq; and PARA 167 ante.

2 3 Bl Com (14 Edn) 177. See also PARA 233 note 12 ante.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(1) HISTORY/260. Action of ejectment.

260. Action of ejectment.

A lessee for years could recover possession in an action of ejectment[1]. This did not rank as a real action, and the procedure was simpler; and, since the lessee's right to recover under his leasehold title depended on the lessor's right to grant the lease, the action was utilised for the purpose of establishing the freehold title[2]. Instead of suing in his own name in a real action, the claimant sued in the name of a fictitious lessee[3]. The convenience of the procedure was so great that real actions fell into disuse save where the claimant had lost his right of entry, for ejectment assumed this right. At length the possibility of the right of entry being severed from the title was abolished, and so were real actions[4]. Ejectment, shorn at a later date of its fictitious incidents[5], became the only means of recovering land, whether freehold or leasehold, and this remedy now exists under the form of the action to recover possession of land[6]. A claimant can thus assert his title either by entry[7] or by action; but if he asserts it by entry this must be done in a peaceable manner; otherwise he is liable to criminal proceedings[8]. Further, a landlord's right to recover possession of premises from a tenant other than by court proceedings has been severely restricted. Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture, it is unlawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them[9]. Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy[10] nor an excluded tenancy[11] and the tenancy has come to an end[12] but the occupier continues to reside in the premises or part of them[13], it is unlawful for the owner to enforce against the occupier, otherwise than by court proceedings[14], his right to recover possession of the premises[15].

1 As to a lessee for years recovering possession in an action of ejectment see PARA 9 ante.

2 See CIVIL PROCEDURE.

3 For an account of the proceedings see 3 Bl Com (14th Edn) 202; and as to the form of proceedings see 3 Bl Com (14th Edn), Appendix no II. As to the old action of ejectment generally see Adams on the Principles and Practice of the Action of Ejectment (4th Edn).

4 See the Real Property Limitation Act 1833 s 36 (repealed).

5 Ie by the Common Law Procedure Act 1852: see CIVIL PROCEDURE vol 11 (2009) PARA 10.

6 See *Gledhill v Hunter* (1880) 14 ChD 492. As to the adaptation of the action of ejectment to an action to determine title generally see 7 Holdsworth's History of English Law 10 et seq.

7 A mere entry is not necessarily equivalent to taking possession. The person entitled to possession may himself enter (*Taylor v Cole* (1789) 3 Term Rep 292 (affd (1791) 1 Hy Bl 555, Ex Ch); *Taunton v Costar* (1797) 7 Term Rep 431; *Turner v Meymott* (1823) 1 Bing 158; *Wildbor v Rainforth* (1828) 8 B & C 4; *Wright v Burroughes* (1846) 3 CB 685; *Davis v Burrell and Lane* (1851) 10 CB 821); or may enter by an agent (*Butcher v Butcher* (1827) 7 B & C 399; *Hey v Moorhouse* (1839) 6 Bing NC 52; *Jones v Chapman* (1849) 2 Exch 803), or by a tenant (*Doe d Hanley v Wood* (1819) 2 B & Ald 724); or may ratify an entry made by a stranger (*Fitchet v Adams* (1740) 2 Stra 1128). The fact that he has obtained judgment for possession at a future date does not preclude him from peaceably entering prior to that date: *Jones v Foley* [1891] 1 QB 730, DC. An entry under title upon part of the property operates as an entry on the whole: Littleton's Tenures s 417; *Cotton's Case* (1590) Cro Eliz 189. Formerly it was necessary that the property should be all in one county: Co Litt 252b. As to entry generally see Cole's Law and Practice in Ejectment 66 et seq.

8 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 602; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 652. As to the exercise of a right of re-entry see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 650 et seq. As to issue and service of the writ being equivalent to re-entry see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 609; *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL.

9 Protection from Eviction Act 1977 s 2: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 653.

10 For the meaning of 'statutorily protected tenancy' see ibid s 8(1) (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 653.

11 References to an excluded tenancy do not apply to a tenancy entered into before 15 January 1989 or a tenancy entered into on or after that date but pursuant to a contract made before that date, but, subject

thereto, 'excluded tenancy' and 'excluded licence' (as to which see note 15 infra) are to be construed in accordance with the Protection from Eviction Act 1977 s 3A (added by the Housing Act 1988 s 31): Protection from Eviction Act 1977 s 3(2C) (added by the Housing Act 1988 s 30(1), (2)). For the meaning of 'excluded tenancy' and 'excluded licence' see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 215.

12 Protection from Eviction Act 1977 s 3(1)(a). See also note 15 infra.

13 Ibid s 3(1)(b). See also note 15 infra.

14 The county court has exclusive jurisdiction: see ibid s 9(1); and the County Courts Act 1984 s 21(1) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule). The phrase 'otherwise than by proceedings in the court' refers to proceedings in the court directed to the premises in respect of which possession is sought and it is not incumbent on the landlord to bring separate proceedings against every occupant: *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 86 LGR 245, CA.

15 Protection from Eviction Act 1977 s 3(1) (amended by the Housing Act 1988 s 30(1), (2)). See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 653. The Protection from Eviction Act 1977 s 3 (as amended) also applies in relation to any restricted contract within the meaning of the Rent Act 1977 (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 848) which created a licence and was entered into after 28 November 1980 (Protection from Eviction Act 1977 s 3(2A) (added by the Housing Act 1980 s 69(1)); and in relation to any premises occupied as a dwelling under a licence, other than an excluded licence (Protection from Eviction Act 1977 s 3(2B) (added by the Housing Act 1988 s 30(1), (2)). As to the meaning of 'excluded licence' see note 11 supra. The Protection from Eviction Act 1977 s 3 (as amended) continues to apply even after the landlord has obtained an order for possession. The order must be executed in accordance with the rules of court: *Haniff v Robinson* [1993] QB 419, [1993] 1 All ER 185, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(2) JURISDICTION/261. General jurisdiction of the High Court.

(2) JURISDICTION

261. General jurisdiction of the High Court.

The jurisdiction of the High Court in actions for the recovery of land is unlimited in amount[1]. However, by statute the county court is given exclusive jurisdiction in certain actions for possession by a mortgagee[2]; in actions where the owner is enforcing against the occupier his right to recover possession of premises which have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and the tenancy has come to an end but the occupier continues to reside in the premises[3]; and in proceedings for determining certain issues relating to residential premises[4]. Where proceedings are commenced in the High Court, the High Court may, either of its own motion or on the application of any party to the proceedings, order the transfer of the proceedings to a county court[5]. In applications for determining residential security issues, if a person takes proceedings in the High Court which he could have taken in the county court, his right to recover costs is restricted[6].

1 As to the original High Court jurisdiction see COURTS.

2 See the County Courts Act 1984 s 21(3); and see MORTGAGE vol 77 (2010) PARA 530.

3 See the Protection from Eviction Act 1977 s 3 (as amended), s 9(1); and PARA 260 note 14 ante.

4 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 982. See also the Housing Act 1996 s 95(2), (3), (5); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 338.

5 County Courts Act 1984 s 40(2), (3) (substituted by the Courts and Legal Services Act 1990 s 2(1)). The High Court, when considering whether to exercise its power under the County Courts Act 1984 s 40(2) (as so substituted), is to have regard to the criteria set out in the High Court and County Courts Jurisdiction Order 1991, SI 1991/724: see art 7(5). See also *Practice Direction* [1991] 3 All ER 349, [1991] 1 WLR 643.

6 See the Rent Act 1977 s 141(4); the Housing Act 1985 ss 110(3), 181(3); the Housing Act 1988 s 40(4), (5) (all prospectively repealed by the Courts and Legal Services Act 1990 s 125(7), Sch 20, as from a day to be appointed under s 124(3)); and see the Housing Act 1996 s 138(3) (not entitled to recover any costs). See also the Supreme Court Act 1981 s 51(8), (9) (substituted by the Courts and Legal Services Act 1990 s 4) (power to reduce costs awarded where a person has commenced proceedings in the High Court which should, in the opinion of the Court, have been commenced in the county court in accordance with any provision made under the Courts and Legal Services Act 1990 s 1 or any other enactment).

UPDATE

261 General jurisdiction of the High Court

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(2) JURISDICTION/262. County court jurisdiction.

262. County court jurisdiction.

A county court has jurisdiction to hear and determine any action for the recovery of land and any action in which the title to any hereditament comes into question[1]. Where proceedings under certain statutory provisions relating to residential premises are being taken in a county court, it also has jurisdiction to hear and determine any other proceedings joined with those proceedings, notwithstanding that those other proceedings would otherwise be outside the court's jurisdiction[2]. Moreover, in certain circumstances, the parties to an action may agree that a county court is to have jurisdiction in the action[3].

1 County Courts Act 1984 s 21(1), (2) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule). As to the transfer of proceedings from the High Court to the county court see PARA 261 ante.

2 See the Landlord and Tenant Act 1987 s 52(3); the Housing Act 1988 s 40(3); the Housing Act 1996 s 95(4). See also the Rent Act 1977 s 141(3).

3 See the County Courts Act 1984 ss 18, 24 (as amended); and COUNTY COURTS. The agreement is by memorandum signed by the parties or their respective legal representatives: see s 18 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 49(3)).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/263. Introduction.

(3) PROCEDURE

263. Introduction.

The particular matters later discussed[1] are those which may arise in connection with actions for the recovery of land either in the High Court or in a county court[2]. Practice and procedure specific to the inferior courts are discussed elsewhere[3]; but, where no express provision is made[4], the general principles of practice in the High Court may be adopted and applied to proceedings in a county court[5].

1 See the text and notes 2-5 infra; and PARAS 264-270 post.

2 As to process and proceedings in the High Court and the course of any action in it see generally CIVIL PROCEDURE. As to mortgage actions see RSC Ord 88; and MORTGAGE vol 77 (2010) PARA 101 et seq. As to the substantive treatment of the law relating to squatters see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 603; TORT.

3 See generally COURTS; and, with particular reference to county court procedure under the Acts relating to residential premises and in mortgage proceedings see LANDLORD AND TENANT; MORTGAGE vol 77 (2010) PARA 101 et seq. As to proceedings in magistrates' courts under the Distress for Rent Act 1737 s 16 see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 649.

4 Ie by or in pursuance of the County Courts Act 1984.

5 Ibid s 76.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/264. Writ of summons.

264. Writ of summons.

Save where the summary procedure[1] is involved, a High Court action to recover possession of land is commenced by the issue of a writ of summons[2] indorsed with a claim for recovery of possession[3]. A mortgagee may obtain possession on an originating summons in the Chancery Division[4], and if this is the proper mode of commencing proceedings he will not be allowed the extra costs of an action by writ[5]. As a rule, all persons in possession of the land of which the plaintiff claims possession should be joined as defendants to the writ[6], but in every case regard must be had to the circumstances[7]. A landlord cannot require his tenant to defend the action on giving him an indemnity[8], nor may he defend in the tenant's name[9]. A tenant is bound to give his landlord notice of an action for recovery of possession against him either in the High Court or in the county court[10]. The court may at any stage of the proceedings order any person not a party to the action who is in possession of the land (whether in actual possession or by a tenant) to be added as a defendant[11].

1 As to summary proceedings for possession see PARA 270 post.

2 Where the premises are vacant and service on the defendant cannot otherwise be effected, the Court may, on an ex parte application, authorise service of the writ to be effected by affixing a copy to some conspicuous part of the property: see RSC Ord 10 r 4; and CIVIL PROCEDURE. As to service of the writ in ordinary cases see CIVIL PROCEDURE. As to commencement of an action in the county court see CCR Ord 3.

3 As to the parties see generally CIVIL PROCEDURE vol 11 (2009) PARA 207 et seq. An action brought to establish title only, without claiming possession, does not rank as an action for recovery of land: *Gledhill v Hunter* (1880) 14 ChD 492. The writ must be indorsed with a statement showing (1) whether the claim relates to a dwelling house; and (2) if so, whether the rateable value of the premises on every day specified by the Rent Act 1977 s 4(2) in relation to the premises exceeds the sum so specified or whether the rent for the time being payable in respect of the premises exceeds the sum specified in s 4(4)(b) (as added); and (3) if the plaintiff knows of any person entitled to claim relief against forfeiture as underlessee (including a mortgagee) under the Law of Property Act 1925 s 146(4) or in accordance with the Supreme Court Act 1981 s 38, the name and address of that person: RSC Ord 6 r 2(1)(c). For a discussion of the purpose of this indorsement see the Supreme Court Practice 1997 para 6/2/20. As to the Law of Property Act 1925 s 146(4) and the Supreme Court Act 1981 s 38 see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 628-629.

4 See RSC Ord 88 r 1; and MORTGAGE vol 77 (2010) PARAS 408, 546. As to default actions by a mortgagee in the county court see CCR Ord 9.

5 As to the extra costs of an action by writ see MORTGAGE vol 77 (2010) PARA 101 et seq.

6 See *Thompson v Slade* (1856) 25 LJ Ex 306; CIVIL PROCEDURE.

7 *Geen v Herring* [1905] 1 KB 152 at 158, CA, per Stirling LJ. The tenant (*Doe d James v Stanton* (1819) 2 B & Ald 371; *Doe d Henson v Roe* (1844) 1 Dow & L 657), or the landlord alone where the tenants are numerous (*Roe v Wiggs* (1806) 2 Bos & PNR 330; *Geen v Herring* supra), or even a mere servant of the occupier (*Doe d Atkins v Roe* (1816) 2 Chit 179; *Doe d Cuff v Stradling* (1817) 2 Stark 187; *Doe d James v Stanton* supra), may be a sufficient defendant. As to the necessary parties to proceedings for possession by a mortgagee of the mortgaged property see MORTGAGE vol 77 (2010) PARA 101 et seq.

8 *Right v Wrong* (1734) Barnes 173.

9 *Roe d Jones v Doe* (1738) Barnes 178; *Doe d Tanner v Gee* (1841) 9 Dowl 612.

10 See the Law of Property Act 1925 s 145; the County Courts Act 1984 s 137(1); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 658.

11 RSC Ord 15 r 10(1): see CIVIL PROCEDURE. As to the method of applying for such an order, and the consequential procedural steps to be followed, see Ord 15 r 10(2), (3). The application may be made even after judgment has been signed and execution issued, but in this case the applicant should apply for leave to issue a summons to set aside the judgment and defend: *Jacques v Harrison* (1884) 12 QBD 165, CA (followed in *Windsor v Chalcraft* [1939] 1 KB 279, [1938] 2 All ER 751, CA); *Minet v Johnson* (1890) 63 LT 507, CA; and see *Billson v Residential Apartments Ltd* [1992] 1 AC 494 at 542, [1992] 1 All ER 141 at 151, HL, per Lord Oliver.

For the corresponding procedure in the county court see CCR Ord 15 r 3.

UPDATE

264 Writ of summons

TEXT AND NOTES--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/265. Statement of claim.

265. Statement of claim.

The plaintiff in his statement of claim[1] must state his title with sufficient particularity to show how he derives his title to the land. A mere general statement that he is entitled under certain documents is not enough. He must set out their effect[2], although it is not necessary to give the exact words unless they are material[3]. If he has not himself been in possession, he must trace his title from a person who has been in possession, and show the successive links in his title[4]. He need not set out the defendant's title; it is generally sufficient to state that the defendant is in possession[5]. If the defendant pleads the Limitation Act 1980[6], the plaintiff must prove a title not extinguished by the statute[7].

1 As to statements of claim generally see LIMITATION PERIODS.

2 *Philipps v Philipps* (1878) 4 QBD 127, CA; *Davis v James* (1884) 26 ChD 778.

3 *Darbyshire v Leigh* [1896] 1 QB 554, CA.

4 *Palmer v Palmer* [1892] 1 QB 319. See also *Hodgins v Hickson* (1878) 39 LT 644 (Ireland).

5 *Hodgins v Hickson* (1878) 39 LT 644 (Ireland).

6 For the effect of expiration of the period of limitation see LIMITATION PERIODS vol 68 (2008) PARA 1095 et seq.

7 See *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51, HL.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/266. Judgment in default and summary judgment.

266. Judgment in default and summary judgment.

Where a writ is indorsed with a claim against a defendant for possession of land only, then, if that defendant fails to give notice of intention to defend or to serve a defence, the plaintiff may, after the time limited for giving notice of intention to defend or (as the case may be) serving a defence, enter judgment for possession of the land and costs as against that defendant, and proceed with the action against the other defendants, if any[1]. Such judgment may not be entered without the leave of the court unless the appropriate certificate[2] is produced[3]. Where there is more than one defendant, judgment entered in default may not be enforced against any defendant unless and until judgment has been entered against all defendants[4]. Summary judgment may be recovered in the normal way[5].

1 See RSC Ord 13 r 4(1) (default of notice of intention to defend), and Ord 19 r 5(1) (default of defence). In both cases the plaintiff must produce a certificate by his solicitor or, if he sues in person, an affidavit stating that he is not claiming any relief in the action of the nature specified in Ord 88 r 1 (specified reliefs claimed by a mortgagor or mortgagee): see Ord 13 r 4(1); Ord 19 r 5(1). As to cases where other claims are joined with the claim for possession see Ord 13 rr 5, 6 (default of notice of intention to defend); Ord 19 rr 6, 7 (default of defence).

2 Ie a certificate by the plaintiff's solicitor or, if he sues in person, an affidavit, stating either that the claim does not relate to a dwelling house or that the claim relates to a dwelling house of which the rateable value on every day specified by the Rent Act 1977 s 4(2) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 856-858), in relation to the premises exceeds the sum so specified or of which the rent payable in respect of the premises exceeds the sum specified in s 4(4)(b) (as added) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 860).

3 RSC Ord 13 r 4(2); Ord 19 r 5(2).

4 See RSC Ord 13 r 4(5) (default of notice of intention to defend); and Ord 19 r 5(5) (default of defence).

5 See RSC Ord 14 r 1; and CIVIL PROCEDURE. A tenant has the same right to apply for relief after summary judgment for possession of land on the ground of forfeiture for non-payment of rent as if the judgment had been given after trial: Ord 14 r 10.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/267. Proof of plaintiff's title.

267. Proof of plaintiff's title.

The plaintiff must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendant's[1]. However, this does not mean that he is bound to show a title good against all the world. Possession in itself is a good title as against everyone except the true owner[2], and, if one who has been in possession is wrongly dispossessed, he is entitled to recover possession against the wrongdoer, notwithstanding that the true title may be shown to be in a third person[3]. If the plaintiff's ownership is proved or admitted, the burden is on the defendant to

confess and avoid by setting up a title or right to possession consistent with the fact of ownership being vested in the plaintiff[4].

1 *Goodtitle d Parker v Baldwin* (1809) 11 East 488 at 495; *Danford v McAnulty* (1883) 8 App Cas 456 at 462, HL.

2 *Asher v Whitlock* (1865) LR 1 QB 1.

3 *Asher v Whitlock* (1865) LR 1 QB 1; *Perry v Clissold* [1907] AC 73, PC; *Doe d Carter v Barnard* (1849) 13 QB 945, contra, is overruled. As to title extinguished by dispossession see generally LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq. In an action for recovery of land the plaintiff should have a legal title (*Allen v Woods* (1893) 68 LT 143, CA; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14, HL); although, perhaps, an equitable owner will be allowed to sue for possession without bringing the legal title before the court (see *General Finance Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15 at 24; *Antrim County Land etc Co v Stewart* [1904] 2 IR 357, Ir CA; *Ocean Accident and Guarantee Corpn v Ilford Gas Co* [1905] 2 KB 493, CA). As to the right of a mortgagor to sue without joining the mortgagee see MORTGAGE vol 77 (2010) PARA 101 et seq.

4 *Portland Managements Ltd v Harte* [1977] QB 306 at 315, [1976] 1 All ER 225 at 230, CA.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/268. Defence.

268. Defence.

The defendant must plead specifically every ground of defence on which he relies, and a plea that he is in possession by himself or his tenant is not sufficient[1]. The defendant may be ordered to make disclosure of the documents in his possession relating to the cause in the same way and subject to the same rights to refuse inspection as in any other kind of action[2].

1 RSC Ord 18 r 8(2).

2 As to the general application of the principles relating to the discovery of documents to actions for the recovery of land, even if based on a claim for forfeiture see CIVIL PROCEDURE; and as to the discovery of title deeds see also BOUNDARIES vol 4(1) (2002 Reissue) PARA 915. As to the right of either party to administer interrogatories see CIVIL PROCEDURE.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/269. Time for delivery of possession.

269. Time for delivery of possession.

A judgment or order of the High Court by which any person is directed to give possession of land need not state a time within which possession is to be given[1]. Except where otherwise provided by statute[2], the court has no discretion to refuse an order for possession where the plaintiff has established his right. However, except in the case of squatters who enter without any colour of title at all[3], the court may postpone the giving up of possession for such period as is permitted by statute[4].

1 See RSC Ord 42 r 2(2). Cf CCR Ord 22 r 3 (time must be stated).

2 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 665; and MORTGAGE vol 77 (2010) PARA 101 et seq.

3 See *Department of the Environment v James* [1972] 3 All ER 629, [1972] 1 WLR 1279; *McPhail v Persons, names unknown, Bristol Corpn v Ross* [1973] Ch 447, [1973] 3 All ER 393, CA; *Swordheath Properties Ltd v Floydd* [1978] 1 All ER 721, [1978] 1 WLR 550, CA.

4 *Jones v Savery* [1951] 1 All ER 820, CA; *Air Ministry v Harris* [1951] 2 All ER 862, CA. As to the maximum period permitted by statute see the Housing Act 1980 s 89; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 665. Even in the case of squatters, the court has power in its discretion to grant a stay of execution pending appeal: *Bibby v Partap* [1996] 1 WLR 931, PC; and see RSC Ord 58 r 1(4); Ord 59 r 14(4).

UPDATE

269 Time for delivery of possession

TEXT AND NOTES--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/REAL PROPERTY (VOLUME 39(2) (REISSUE))/7. ACTIONS FOR THE RECOVERY OF LAND/(3) PROCEDURE/270-300. Summary proceedings for possession.

270-300. Summary proceedings for possession.

Where a person claims possession of land[1] which he alleges[2] is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy[3]) who entered into or remained[4] in occupation without his licence or consent or that of any predecessor in title of his, proceedings in the High Court may be brought by originating summons[5]. The plaintiff should join as defendants to the summons all persons in possession of the land whose names he knows[6]. The summons must be indorsed with or contain a statement showing whether possession is claimed in respect of residential premises or in respect of other land[7]. In support of the summons the plaintiff must file an affidavit stating his interest in the land, the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises, and that he does not know the name of any person occupying the land who is not named in the summons[8]. Unless the Court otherwise directs, any such affidavit may contain statements of information and belief with the sources and grounds thereof[9].

Where any person in occupation of the land is named in the originating summons, the summons[10], together with a copy of the supporting affidavit, must be served on him (1) personally; or (2) by leaving a copy of the summons and of the affidavit or sending them to him at the premises; or (3) in such other manner as the court may direct[11]. Where any person not named as a defendant is in occupation of the land, the summons must be served (whether or not it is also required to be served as above), unless the court otherwise directs, by (a) affixing a copy of it and of the affidavit to the main door or other conspicuous part of the premises and if practicable, inserting through the letter box at the premises a copy of the summons and of the affidavit enclosed in a sealed transparent envelope addressed to 'the occupiers'[12]; or (b) placing stakes in the ground at conspicuous parts of the occupied land, to each of which is affixed a sealed transparent envelope addressed to 'the occupiers' and containing a copy of the summons and a copy of the affidavit[13].

A final order for possession on the originating summons may not, except in case of urgency and by leave of the court, be made (i) in the case of residential premises, less than five clear days after the date of service[14]; and (ii) in the case of other land, less than two clear days after the date of service[15]. The proceedings may be heard and determined by a master, who may refer them to a judge if he thinks they should properly be decided by the judge[16]. A writ of possession to enforce the order may be issued without leave, but no such writ may be issued

more than three months from the date of the order without the leave of the court[17]. The court may, on such terms as it thinks just, set aside or vary any order made in the proceedings[18].

1 Note that, where possession of a dwelling is claimed, the county court will in many instances have exclusive jurisdiction: see further PARAS 260 note 14, 261 notes 2-4 ante.

2 Where the existence of a serious dispute is apparent to the plaintiff, he should not use this summary procedure: *Filemart Ltd v Avery* [1989] 2 EGLR 177, CA. If he does, the action may be struck out: *Henderson v Law* (1984) 17 HLR 237, CA. However, the court has no discretion to prevent the plaintiff using the procedure where circumstances are such as to bring them within its terms: *Greater London Council v Jenkins* [1975] 1 All ER 354, [1975] 1 WLR 155, CA; *Eyles v Wells* (17 April 1991, unreported), CA.

3 The words in parentheses apply only to persons who, as against the person claiming possession, can establish that they are holding over under tenancies binding on that person, and therefore do not include unlawful sub-tenants: *Moore Properties (Ilford) Ltd v McKeon* [1977] 1 All ER 262, [1976] 1 WLR 1278.

4 RSC Ord 113 r 1 thus applies to a person who entered into possession pursuant to a licence but whose licence has terminated: *Bristol Corpn v Persons unknown* [1974] 1 All ER 593, [1974] 1 WLR 365; *Greater London Council v Jenkins* [1975] 1 All ER 354, [1975] 1 WLR 155, CA. However, proceedings under RSC Ord 113 r 1 have been held inappropriate for the recovery of possession by a mortgagee: *London Goldhawk Building Society v Emener* (1977) 121 Sol Jo 156. As to the powers of the police in relation to collective trespass see the Criminal Justice and Public Order Act 1994 Pt V (ss 61-80); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 590 et seq. As to the making of interim possession orders referred to in ss 75, 76 see CCR Ord 24 Pt II (rr 8-15).

5 RSC Ord 113 r 1. See further CIVIL PROCEDURE. For the equivalent provision in the county court see CCR Ord 24. RSC Ord 113 was introduced in order (1) to provide a procedure for obtaining possession where not every wrongful occupier can be identified; and (2) to provide a more speedy procedure for obtaining a final order for possession. It merely supplements the procedural law, and does not affect the form of redress which the court has jurisdiction to grant. Thus, in appropriate cases the court may make a possession order extending to the whole of an owner's property, even though only part of that property is adversely occupied: *University of Essex v Djemal* [1980] 2 All ER 742, [1980] 1 WLR 1301, CA; *Ministry of Agriculture and Fisheries v Heyman* (1989) 59 P & CR 48. For the form of originating summons see RSC App A, Form 11A; Ord 113 r 2. No acknowledgment of service is required: Ord 113 r 2(1).

6 Any person not named as a defendant who is in occupation of the land and wishes to be heard on the question whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant: RSC Ord 113 r 5.

7 RSC Ord 113 r 2(2).

8 RSC Ord 113 r 3(a)-(c).

9 RSC Ord 113 r 3.

10 Every copy of an originating summons for service under RSC Ord 113 must be sealed with the seal of the court office out of which it was issued: Ord 113 r 4(2A).

11 RSC Ord 113 r 4(1)(a)-(c). Service of documents under Ord 113 r 4(1), may be effected in any of the three ways prescribed in Ord 113 r 4(1)(a), (b) or (c), since the word 'or' between each of these paragraphs presents a true alternative method of service; it is not a condition for effective service under Ord 113 r 4(1)(b) that personal service under Ord 113 r 4(1)(a) should have proved impracticable: *Crosfield Electronics Ltd v Baginsky* [1975] 3 All ER 97, [1975] 1 WLR 1135, CA.

12 RSC Ord 113 r 4(2)(a).

13 RSC Ord 113 r 4(2)(b). Order 28 r 3 (notice of first hearing etc) does not apply to proceedings under Ord 113: Ord 113 r 4(3).

14 RSC Ord 113 r 6(1)(a).

15 RSC Ord 113 r 6(1)(b). For the practice to be followed in proceedings under Ord 113 see the Supreme Court Practice 1997 para 113/1-8/9. The court has no power to suspend an order for possession against trespassers, except in its discretion pending an appeal or unless the owner consents: see further PARA 269 note 4 ante.

16 RSC Ord 113 r 1A.

17 See RSC Ord 113 r 7(1). An application for leave may be made ex parte unless the court otherwise directs: Ord 113 r 7(1). The sheriff enforcing the writ is entitled to evict anyone in occupation, whether or not a party to the proceedings: *R v Wandsworth County Court, ex p London Borough of Wandsworth* [1975] 3 All ER 390, [1975] 1 WLR 1314, DC (decided under the former CCR Ord 26, now CCR Ord 24). Similarly, a writ of restitution can be issued to recover land from occupants who were neither party to the original proceedings nor dispossessed by the earlier writ of possession. However, it is appropriate for the court to grant leave to issue a writ of restitution in such circumstances only where there is a plain and sufficient nexus between the original recovery of possession and the need to effect further recovery of the same land: *Wiltshire County Council v Frazer* [1986] 1 All ER 65, [1986] 1 WLR 109. As to writs of restitution see CIVIL PROCEDURE vol 12 (2009) PARA 1270.

18 RSC Ord 113 r 8.

UPDATE

270-300 Summary proceedings for possession

TEXT AND NOTES--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 5--A local authority does not have to take into account the guidance contained in the Department of Environment Circular 18/94 (Gipsy Sites Policy and Unauthorised Camping), which suggests that a local authority, before seeking recovery of its own land under Ord 113, should use its powers to evict gipsies in a humane and compassionate fashion: *R v Brighton and Hove Council, ex p Marmont* [1998] JPL 670. See also *R v Hillingdon LBC, ex p McDonagh* [1999] EHLR 169 (decision on similar grounds relating to possession proceedings under CCR Ord 24). Where the evidence suggests that a trespasser is likely to move on to a separate parcel of the owner's land, an order for possession may not be made to extend to that other parcel of land: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780, [2009] All ER (D) 16 (Dec), explaining *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906.